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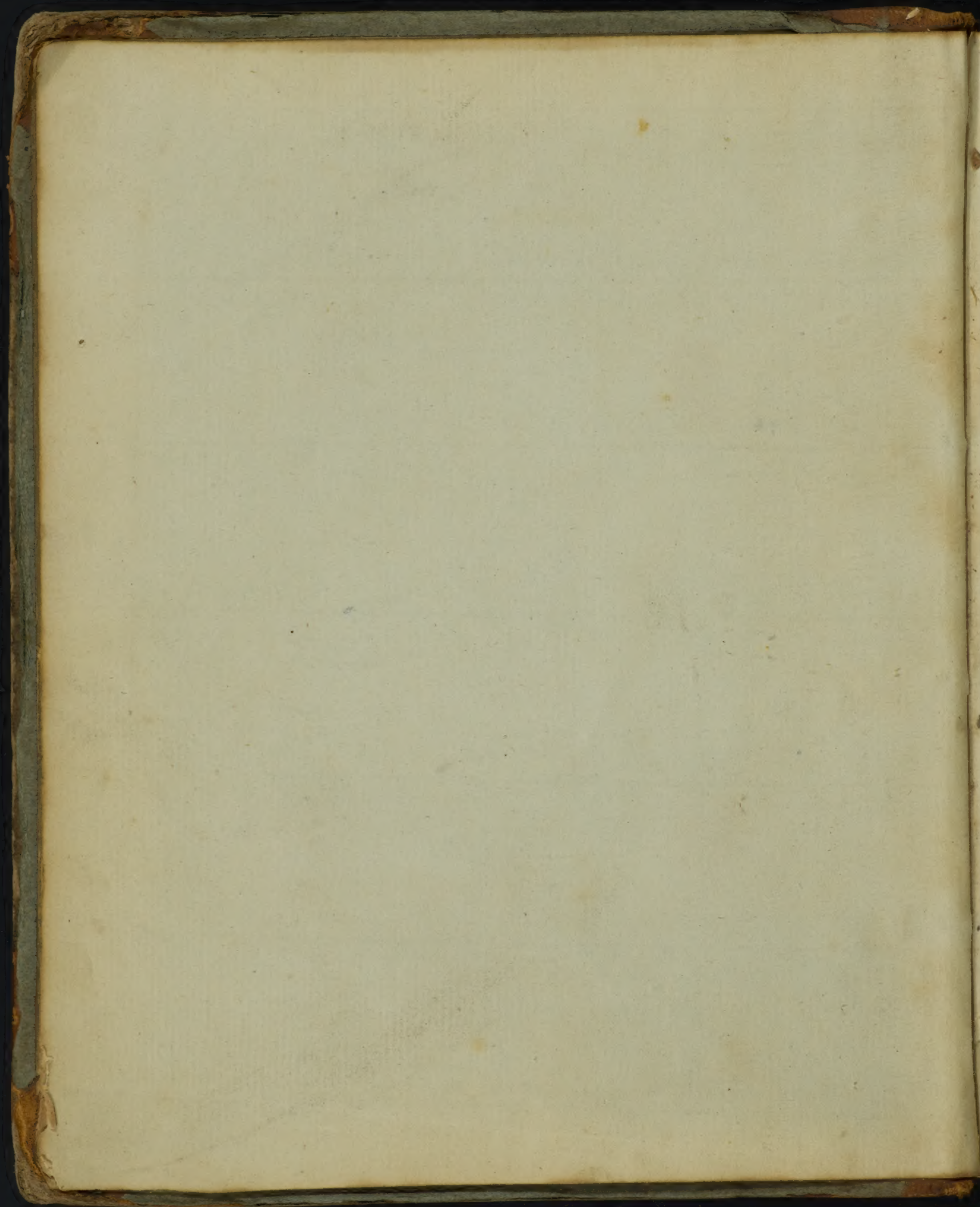
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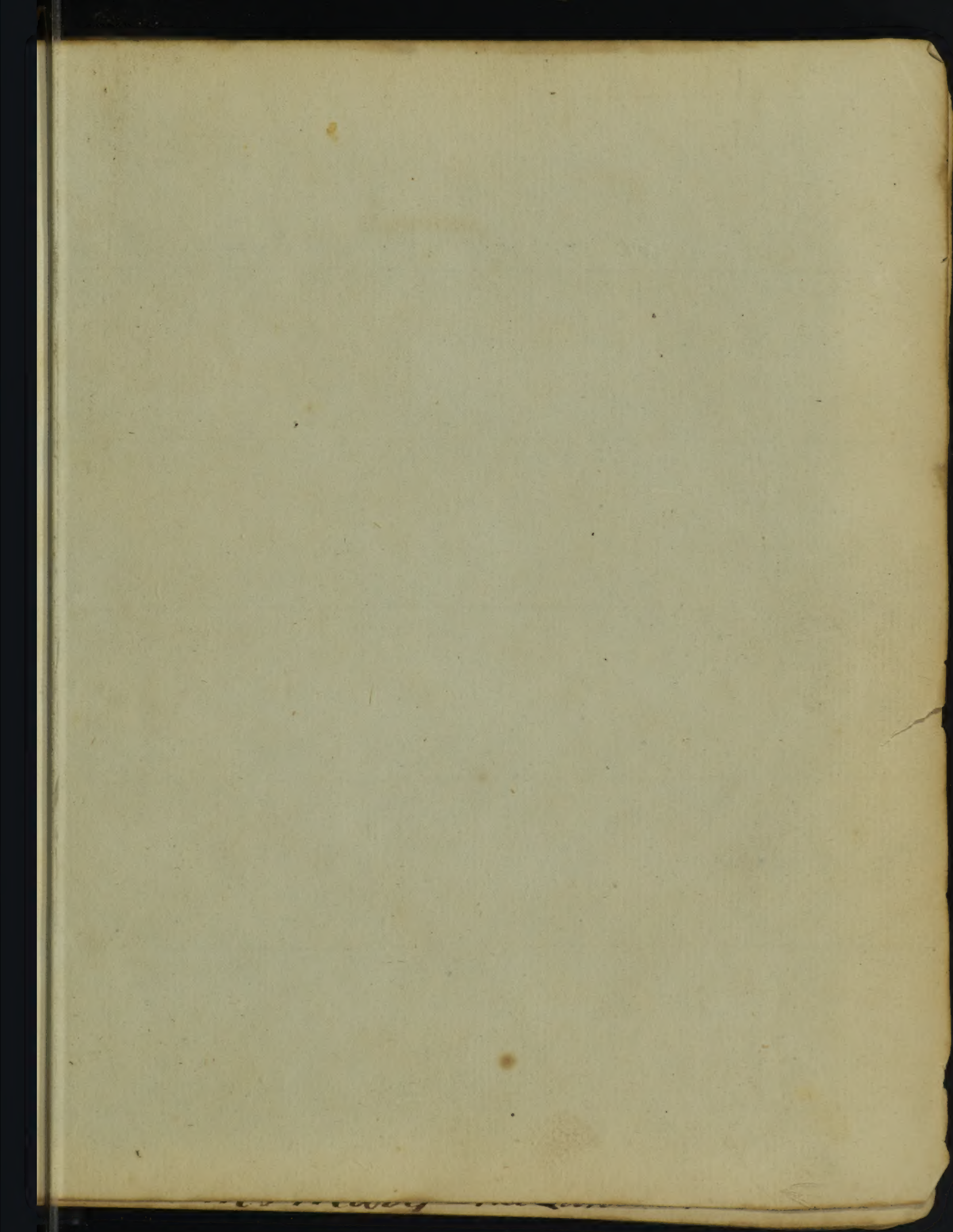
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1871











Off the 1<sup>st</sup> Mate & discharged

George

—



# Of the Estate of a deceased Person

Under the English Law the law respecting the Estate of deceased persons is as follows.

The Estate is of 2 kinds real and personal

When real it vests on the decease in the de<sup>d</sup> heir, when personal in his administrator

The Real Estate in the hands of the heir is not liable to pay any debts of the de<sup>d</sup> unless where the intestate has bound his heirs by some specialty under seal; in such case the heir is liable or rather as it was at common law.

The Lands in the hands of the heir by descent was liable for such debts and the descent was void as to <sup>such</sup> creditors, for the judgment levy of Execution. It was conformable to this idea: but if in such case the heir aliened before such brought the heir was not liable and the lands in the hands of purchaser was discharged of its lien: this defect is remedied by the Statute of William & Mary - the Lands remain



2  
discharged but the heir remains liable to the  
value personally - Real property in the hands  
of a devisee was not liable but by the same  
Statute they are made so - Real property is  
not the only fund for payment of debts that are  
specially: for personal property in the hands  
of the administrator is also liable to pay all  
debts of any description: specially as well  
as others and such Estate is liable to be  
exhausted by the specially creditors; for they  
are not obliged to resort to the heir - Under  
the English Law that priority in creditors is to be  
observed: as in the 1<sup>st</sup> place debts due to the king in <sup>Eq.</sup>  
the second place debts obtained by judgment - 3<sup>d</sup>  
Specially creditors - 4<sup>th</sup> Simple contract debts  
If therefore there be no more than sufficient to satisfy  
by the king's debts it must be so applied - then  
if a surplus it must be applied to jud<sup>l</sup> debts  
&c. The specially creditors may resort to the  
dece<sup>d</sup>ent's real Estate but should they resort to the  
personal Estate the heir may enjoy a large  
Estate descended from his ancestor whilst his



his debts remain unpaid - Inst: £500 real Estate 3  
in the hands of the ~~Deer~~ and £500 Specialty debts are  
due and £500 also of the Estate in the adm<sup>n</sup>. and also  
£200 simple contract debts - if in this case the specialty  
creditors resort to the personal Estate and completely  
exhaust that fund the adm<sup>n</sup>. may plead *plene admi-  
nistravit* and the simple contract creditors must  
remain unsatisfied - Suppose that there £700 simple  
contract debts and no specialty debts and £500 Estate  
in the hands of  $\gamma$  heir and £500 in the hands of the  
adm<sup>n</sup>. it is clear that two of the £700 must remain  
unpaid - However Chancery affords a partial reme-  
dy and if there are specialty creditors who refuse to  
resort to the heir and in this way the personal Estate  
of the dec<sup>d</sup>. is exhausted so that the simple contract  
debts may not be discharged in some instances - but  
Chancery in such cases upon application will  
pass a decree in favor of  $\gamma$  simple contract creditors  
to  $\gamma$  extent of such specialty debts as have been satis-  
fied from the personal Estate which might have been  
satisfied from the ~~real~~ real - Inst: £600 simple contract  
debts and £300 specialty debts - The specialty creditors  
resort to the personal fund and at Law the simple  
contract creditors will obtain 10/ only upon 20s: but  
Chancery will place the simple cont: creditors in the  
place of the specialty creditors to the extent of the speci



cially debts taken from the personal fund or Estate  
 When such a decree in Chancery is passed there is  
 no priority but all are paid ~~pari passu~~ being Equi-  
 table assets. (But in this country no such system  
 prevails by reason of the Statutes of Insolvent Estates  
 and others respecting the settlement of Estates.)

Personal property in the hands of the adm<sup>r</sup>. is af-  
 fets to pay all debts as before mentioned, to the full  
 extent of the assets and no farther and the debts are to  
 be p<sup>d</sup>. according to priority of rank above mentioned  
 and the adm<sup>r</sup>. must observe this priority at his pe-  
 ril if he does not observe this priority of rank he cannot  
 protect himself by pleading *plene administravit*.

Examp: £300 specially debts and £300 property  
 also £200 simple - contract debts - the adm<sup>r</sup>. pays  
 2 bonds of £100 each and yet another due - he then  
 pays a simple Contract which exhausts the whole fund  
 in this case *plene administravit* is not a plea suff<sup>t</sup>  
 to an action brought on a bond which is not settled  
 but in order to ~~charge~~ charge the adm<sup>r</sup>. or Ex<sup>r</sup>. on this  
 ground it must appear that he had notice of such debts  
 of an higher nature than subsisting. It may be  
 observed that among those creditors of equal degree  
 or rank there is no priority to be observed and the  
 adm<sup>r</sup>. or Ex<sup>r</sup>. may prefer whom he pleases unless by  
 legal ~~diligence~~ diligence one creditor has gained



a priority by judgment &c. - If the administrator becomes a Bankrupt and wastes the assets the creditors may resort to adm<sup>n</sup>. bond to the extent of it.

But if an Ex<sup>r</sup>. becomes a Bankrupt there is no bond in Eng<sup>d</sup>. to resort to unless such Ex<sup>r</sup>. has been compelled in Chancery to procure bond as it may be done when he is about to waste the Estate - this bond may be obtained by the application of the creditors: but suppose the adm<sup>n</sup>. has paid all the debts that came to his knowledge and has paid Legacies and distributed the surplus among the representatives and after such distribution a creditor appears and claims the adm<sup>n</sup>. provided he had notice of such debt will be liable to the extent of it: but the adm<sup>n</sup>. may afterwards call upon the Legacies or those who have the distributive shares and compel them to refund to the amount of the debt - So if the creditor does not elect to pursue his remedy ag<sup>t</sup>. the adm<sup>n</sup>. he may in Equity pursue the Estate into whosoever hands the Estate can be found - a material question here arises of which no authority can be found - Inst: It is agreed on all hands that Cred<sup>rs</sup> may resort to Legacies &c for so long as there are assets they may be taken where found - But the question is can they resort to such Legacies &c after adm<sup>n</sup>. is granted and bonds given by the adm<sup>n</sup>. who has



1  
Mr. B. become a bankrupt - The question may they  
waive the bond and resort to the Legatee? It is  
apprehended that the Creditor must first resort to  
the bond to the extent of it: but in the event of the  
bondsmen being a bankrupt he may resort  
to Chancery and compell the Legatee to refund  
There are aspects in Equity and not in Law - Inst:  
A man dies possessed of an Equity of redemption  
worth £1000 which depends to the heir - Law will  
not compell the heir to redeem but Chancery will  
consider such Equity as aspects and by an applica-  
tion to them by Creditors, Chancery will compell  
the heir to redeem and to sell the land and the mo-  
ney arising therefrom is averaged among all the  
Creditors without any regard to priority of rank  
altho' the real Estate is not the fund for  $\frac{1}{2}$  paym<sup>t</sup>.  
of debts yet the testator may charge his lands  
with the payment of his debts in many ways which  
is to be come at only in Chancery - First he may  
empower his Ex<sup>r</sup>. to sell Land and their deed will  
be valid and the money arising from the sale there-  
of is aspects in the hands of the Ex<sup>r</sup>. for  $\frac{1}{2}$  payment  
of debts: If the Ex<sup>r</sup>. will not sell the land then in his  
power the Cred<sup>r</sup>. may apply to Chancery who  
will decree that the Ex<sup>r</sup>. shall fulfill his trust



And after the Ex<sup>r</sup> has complied with the decree and 7  
affected a sale of the Lands the money is consid-  
ered as legal assets and a priority is to be obser-  
ved. 2<sup>d</sup> The testator may give his lands  
to the Ex<sup>r</sup> to sell for the payment of his debts  
and the difference between ~~empowering~~  
and giving appears to be this - that when the  
Ex<sup>r</sup> is empowered to sell he has not the fee of  
the Land but is in fact obliged to sell - if lands  
are given to him he has the fee of it and may  
pay out the value of it from his own Estate and  
keep the Land but if he does not he will be  
compelled in Chancery to a sale. 3<sup>d</sup> Testator  
may devise to such a one with the incumbrance  
of paying his debts - If the devisee in this case  
will not pay the debts the lands descend to the  
heir at Law and the intention of the testator  
is thwarted: But if the devisee has proceeded  
to discharge a part of the debts and ~~then~~ does  
not discharge the whole it is a breach of his trust  
and the heir may claim - yet if by a species  
of conduct the heir waives his claim Chancery  
will compell the Devisee to proceed and the heir  
shall not be admitted to ~~compell~~ the inheritance



So lands may be devised to be sold for a special purpose as if lands be devised to B. to raise a portion for the testator's children the money arising from such lands when sold is not assets in the hands of the Executor yet these same lands are assets in the Devisee's hands to satisfy specially Creditors who are wasted. Finally the Testator cannot devise away his Estate to the prejudice of specially Creditors. So if a man be entitled to a reversion of an Estate which after his death depends to his heir yet it is considered as assets for y<sup>e</sup> pay<sup>t</sup>. of debts. But a reversion after an Estate-tail is spent is not considered as assets on account of the almost impossibility of its being spent. Besides it is liable of being doctored down and turned into a fee. So Choses in Action are not assets untill recovered and the Ex<sup>r</sup>. is not liable to an action untill he has been guilty of negligence. To charge the Ex<sup>r</sup>. however judgment must pass subjecting him to the payment of the debt quando acciderit. And when the debt shall be collected by the Ex<sup>r</sup>. the Court on a motion will issue an Execution to the amount of the Chose collected by the Ex<sup>r</sup>. So all the profits of personal Estate as a lease for Years after rent paid if there be surplus arising from the profits is assets for y<sup>e</sup> payment of debts. True indeed in accounting before the Ecclesiastical Court or Court of Chancery. They are not compelled to account for the profits



of the first year - the law allowing them that space  
of time to obtain possession, So again the inte-  
rest of the Testator's money must be accounted for - So  
for damages ~~done~~ recovered for injuries done to y<sup>e</sup>  
Estate of the Testator whether in the life time of y<sup>e</sup>  
Testator or after are assets and must be accounted  
for And to recover them it seems to be immaterial  
whether he brings the action in his own name or  
as Executor of the deceased as if there should be a lease  
of Land made by the testator, and after his death  
there is rent due on such lease the Ex<sup>r</sup> in such  
case may bring an action for the recovery of the  
rent either as Ex<sup>r</sup> or in his own name

The Estate vesting in the hands of the adm<sup>r</sup> may  
cease to be assets and yet the adm<sup>r</sup> be liable to account  
for them As if goods be lost without any neglect  
of his - as if a horse should die he may plead  
plene administravit but if the goods were lost  
thru' his neglect the Creditor ~~may~~ may reply over  
a Swastavit - Goods in the testator as trustee are  
not assets and the reason assigned is that the legal  
Estate ~~is~~ is in the Cestui que trust - Suppose the  
Cestui que trust should die the Estate in trust is not  
assets in law in the hands of the Ex<sup>r</sup> of Cestui que trust  
for they say the legal ~~but~~ Estate is now in the hands  
of the trustee - But Chancery lays hold of such  
Estate and considers it as equitable assets in the



hands of the Ex<sup>r</sup>. Then are the principal kinds  
of assets which vests in the hands of the Ex<sup>r</sup>. or  
Adm<sup>r</sup>. — The next question that arises what is  
to be done with this property? We have already  
seen what becomes of the real property —

### Of the duty of an Ex<sup>r</sup>. or Adm<sup>r</sup>.

To bury the dead & 2<sup>d</sup>. To pay the debts of the dec<sup>d</sup>.  
by an application of the assets in his hands &  
the residue to distribute to the persons mentioned  
in the Stat<sup>t</sup>. of Charles 2<sup>d</sup>. — And it is observable that  
this distributary share on the death of the intestate  
vests immediately in the persons pointed out in  
Statute: So that should the persons entitled to it  
die before distribution made it would be trans-  
missible to his representative and not to the  
representative of the first intestate — in short such  
distributary share is properly compared to a  
legacy vesting in the legatee — An Executors duty  
as to paying debts is the same as an Adm<sup>r</sup>.  
and he is to discharge all legacies and in doing  
this he must observe to perform all specific legacies  
in the first place and next the pecuniary lega-  
cies in their order and should there ~~be~~ still be



a residuum if there is ~~an~~ residuary Legatee he 11  
must pay it over to him and if there be no re-  
siduary Legatee the former rule was that he the  
Ex<sup>r</sup> took it himself. but as the rule now is  
if there is a legacy given the Ex<sup>r</sup> he is considered  
as a trustee of the residuum for the next of kin  
provided the Legacy be such as plainly shews  
the intention of the testator that such legacy  
was all that the testator intended to bestow up  
on him - and his residuum must be dis-  
tributed according to the Statute of distribu-  
tion - But if the Legacy given to the Ex<sup>r</sup>  
be of some trifle or some particular thing  
for a particular purpose or a diamond ring  
suit of mourning clothes &c which ~~things~~  
does not raise the presumption that the tes-  
tator did not mean to give him more yet  
he will be entitled to the ~~residuum~~ residuum  
The first case of this kind that occurs is Fos-  
ter and Monte on which all subsequent 1 Vly.  
cases seem to be founded (Vide 1 P. Wms 9. 550- 47.  
St: 560 - 2 Vly. 162. 91. 27 - 2 Atk 220 - 3 P. Wms 40  
2 Atk 226)



72  
70  
J. Wills  
313  
Again Courts of Chancery will let in parol  
proof to shew the Testators intention that the  
Ex<sup>r</sup>. should have the residuum ~~not~~ notwithstanding he has a legacy given him - On the  
other hand they will not let in parol proof  
to shew that the testator intended the Ex<sup>r</sup>.  
should not have the residuum where there has  
been no legacy given him - For say they  
is a well known rule in Chancery that pa-  
rol proof may be admitted to rebut an Ex-  
-ty and to oust an implication of law  
which are apprehended to mean one  
the same thing -

Co. 136  
Roll  
134  
Hend.  
136  
Hed.  
160  
Co. 136  
373  
79  
136  
If a debtor be made Ex<sup>r</sup>. it is said his debt is released  
and extinguished - but it is only a release of y<sup>e</sup>.  
action and he is accountable for ~~his~~ his  
debt to the creditor - if indeed there be a residue  
-um he will have it for there is no one to acc<sup>t</sup>.  
with - But it is apprehended that the reason  
given why the action is released is not a true one  
(viz) "That an Ex<sup>r</sup>. cannot sue himself" - for the same  
absurdity would take place in case of an executor  
and yet it never was pretended that the action



13.  
was released when a debtor was made ~~Ex.~~  
Adm. - The true ground of this distinction ap-  
pears to be this - The Executors debt is released to  
him where there is a residuum as being due to  
him according to the old Law and should a le-  
gacy be given him and still a residuum he  
would be obliged to distribute the debt which  
he owes, to the rest of him - An Adm. is  
a good witness in any action concerning the  
Estate of the dec. on the ground being a trust-  
ee for the rest of him he is not interested. But  
an Ex. cannot be a witness because say they  
he is interested altho' a trustee - In this State  
indeed he is considered as a naked trustee  
When we considered the case of assets ~~above~~ the  
forementioned one case was omitted under  
the head of Equitable assets which ought to  
have been contemplated - for Instance - a  
man may devise lands to an indigent  
person in trust to sell and pay his debts:  
when this is the case the lands are considered  
as Equitable assets ~~and~~ and not legal af-  
sets: but this being the case Chancery inter



14  
70  
free and in case the devisee will not sell the  
Lands Chancery will compel him to do so  
in which case the Creditors will share equally  
But should the devisee proceed to sell the  
land and apply the money to the payment  
of debts there appears to be no law that  
compells him to observe any priority  
and it is apprehended that he may as  
well pay simple contract creditors as  
those by specialty.

Mr.  
R.

### Of the duty of an Executor as to Legacies

If the Ex. has assets in his hands he must  
discharge the legacies in the first place  
specific legacies &c in the order before ob-  
served and if there be an insufficiency to  
discharge the pecuniary legacies after the pay-  
ment of the specific legacies they must abate and  
share equal proportions but the specific legacies  
are never to abate. — Of a Legacy: There needs  
no set form of words to constitute a legacy: but any  
words which show the intention of the testator  
are sufficient — Legacies therefore may be given



by implication as if the testator should say<sup>10</sup>  
"I release," "I promise," "It is my desire" "I request my  
Ex<sup>r</sup> to pay" - As a case in the books where the tes-  
tator said "I give and bequeath to B £100 beside  
my Cloak" - The Cloak altho' not mentioned  
before in the Will was held to pass - Legacies  
shall have aid from the real Estate in y<sup>e</sup> place of  
of specially creditors and the same rule applies 410  
to them in this respect as to simple contract  
creditors - Inst: Lands are devised for the pay<sup>t</sup>.  
of debts and such devise includes all debts if there-  
fore all the personal Estate should be exhausted  
for the payment of simple contract and spe- 3P. 2  
cially debts nothing being left for Legacies - the 32<sup>d</sup>  
Legacies shall stand in the place of creditors and  
have their Legacies out of the Lands so devised  
the intention of the testator being clear y<sup>t</sup>  
the personal fund should be exhausted in sa-  
tisfaction of Legacies - So again where  
Lands are devised for paym<sup>t</sup>. of debts and the  
personal fund be exhausted the person entitled  
to a distributary share shall in Equity stand  
in the place of y<sup>e</sup> creditor to the amount of the



## personal Estate

Legacies are either lapsed or vested - A lapsed legacy is where the Legatee dies before the testator Inst: A makes his will and names B as a Legatee - B dies before A - the legacy is ~~lapsed~~ lapsed and is not transmissible to the representative of the Legatee but reverts back in to the personal fund and if there be a residuary legatee it vests in him otherwise it is disposed of by the will and the testator ~~as~~ dies intestate as to that particular Legacy

There appears to exist in Chancery a very nice distinction with regard to lapsed and vested legacies and the legacy may be lapsed altho the Legatee die after the testator - Inst: A legacy is given to B when he shall ~~arrive~~ arrive at the age of 21 - If the legatee die before he arrive at the age of 21 it is a lapsed legacy notwithstanding the testator having died first and the reason of this is because it was to be ~~pay~~ paid to him at the age of 21 and therefore it is not considered as vested in him till the age of 21 and if he dies



before that time it is a lapsed legacy: But if the <sup>17</sup>  
Estate is given to be paid at the age of 21 then it is  
a vested legacy because very they by the terms of  
the Will it is given to him at the present time <sup>3 Aff.</sup>  
to be paid not untill he arrive to the age of 21 <sup>203</sup>  
- If there is any thing evincive of the testator's in-  
tention that it should be a vested legacy then it  
shall be considered as such by the Court as much  
as if the testator should say "to be p.<sup>d</sup> at the age of 21  
and to run upon interest till that time" In this  
case it shall be a vested legacy notwithstanding <sup>3. D.</sup>  
that it was mentioned to be paid at the age of 21 <sup>114</sup>  
So in all cases where it is given over on the event of the <sup>3 Aff.</sup>  
death of the Legatee it is a vested legacy and goes to the <sup>11.</sup>  
representative of the legatee <sup>2 Aff.</sup>  
<sup>329</sup>  
<sup>2 Aff.</sup>  
<sup>610</sup>

It has been strenuously litigated whether a ~~repetition~~  
repetition of a Legacy in a Will should be construed  
as cumulative or as a repetition only: Inst  
A gives B £1000 and soon after in the same  
Will gives B £1000 - or he gives B £500 in one  
place and £1000 in another place in the Will: The  
question litigated was whether B should be entitled  
to both sums in the Will as given - The rule now seems  
to be established that where the testator devises or



108  
a legacy to B of £1000 and in the same Will  
and *totidem verbis* devises £1000 more to P.  
it is considered as a repetition only and B shall  
be entitled to the first £1000 only: But if he  
gives to B £1000 and afterwards mentions another  
£1000 *with* the word "more" or "further" &c  
by which you may discover the intention or  
if it be in a codicil or different instrument it is  
cumulative and B takes £2000.

It was formerly holden that when a man gave  
a legacy to a creditor which was equal to the debt or  
more it was in satisfaction of the debt. A short history  
of this and the rule afterwards made may af-  
ford perhaps some instruction as well as satis-  
faction to the curious in researches of legal know-  
ledge. "More than a Century has elapsed since  
it was an established rule in Chancery that if  
a Debtor gave a creditor a legacy in his will it  
was applied in satisfaction of the debt. Under  
this rule several cases were obtained and it was  
carried to a remarkable length in *Crannas* case  
when the debt was contracted subsequent to the ma-  
king of the will and the legacy was held to dis-  
charge it. Another circumstance which gave



19  
rise to such construction was that where a man  
entered into articles of marriage and therein cov-  
venanted to settle a portion on his intended wife and  
afterwards in his Will gave her a portion to the  
same amount both portions could not pass for  
it was presumed the Testator had performed his  
covenant. By this time it was apparent the  
Chancellor did not relish the rule: they therefore  
laid hold of certain circumstances in order to evade  
the rule and by degrees utterly to abolish it. These  
circumstances it will be necessary to examine  
which will be illustrated by cases. The first  
case in which they attempted to break in upon  
the rule was a case in which there was a Legacy  
given to a creditor of a larger sum than the debt &  
the Legacy was to be paid in a different kind of pro-  
perty from what the original contract specified. The  
Chancellor in order to get rid of this case observed  
that this could not be intended as satisfaction of  
the debt it being of a greater value and not  
jusdem generis. Many cases seem to have been  
determined upon this principle. A case  
however soon arose where the Legacy given was  
to the same amount of the debt and to be paid  
in property jusdem generis but it happened the



20 debt was payable six months before the Legacy  
and the Chancellor lay'd hold of this circumstance  
and said this case did not come within the rule  
and that the testator ~~was~~ intended the debt should  
be first discharged and the Legatee should be  
entitled to the Legacy.

A third case arose when the Legacy was to the  
same amount to be paid at the same time  
that the debt became due and in property  
ejusdem generis - The Chancellor now found  
himself involved in some difficulty but in  
order to take this case out of the rule he lay'd  
hold of the common expression in the Will  
"After all my just debts are paid" from hence  
he concluded that the testator intended the  
debt should be paid besides the Legacy; he  
therefore decreed both the debt and Legacy  
to be paid. Soon after this a fourth case  
arose in which the legacy was to the same amount  
~~payable~~ payable at the same time of the debt  
and the Will was destitute of the common  
expression "after all my just debts are paid" but  
the Legacy happening to be given to a bas-



21  
said: The Chancellor observed that as there was  
no precedent relative to a bastard he should be  
favoured: and of course decreed him his Lega-  
cy. <sup>2d</sup> A case arose striped of every circum-  
stance that the Chancellor had heretofore been  
favoured with: He then was obliged to have  
recourse to his own feelings and accordingly  
declared that unless something positive could  
be found in the intention of y<sup>e</sup> testator that  
the Legacy should go in satisfaction of y<sup>e</sup>  
debt, the Legatee should have both sums. And  
to complicate the overthrow of y<sup>e</sup> rule the Chan-  
in another case declared that unless the tes-  
tator made use of direct expressions in the  
Will that the Legacy should go in satisfacti-  
on of the ~~debt~~ it shall be presumed that he  
intended it should not. Thus have the  
Chancellors by a series of adjudications ad-  
vancing one after the other attended each with  
their particular circumstances evaded and com-  
pletely overthrown a rule which perhaps  
might be said to be founded in Equity and to



accord with the mind and intention of the  
 testator (Vide, in order to corroborate the above  
 observations, the following authorities:—  
 1<sup>st</sup> P. Will: 410... 2<sup>d</sup> P. Will: 616-555, 3<sup>d</sup> P. Will: 2<sup>nd</sup>  
 2<sup>d</sup> Alh: 300: 3<sup>d</sup> Alh: 96: - 1<sup>st</sup> Ves: 521. 2 Ves: 409-  
 2 V: 636. - 1<sup>st</sup> Brown in Chan: 129: 295: 425.

Of a Legacy carrying interest  
 under the English Law

It seems from the English Law to be a general  
 principle that after a Legacy becomes payable  
 it ~~carries~~ carries interest, if not paid, until it is  
 paid and this principle seems to have obtained  
 in this Country except <sup>in</sup> Connecticut. ~~This point~~  
~~is a point which has been found in this~~  
~~country that it has been thought reasonable that the~~  
~~testator~~ The rule in England with regard to the  
 interest of a Legacy that if it be given payable  
 415. at a future time it cannot be on interest till  
 that time arrives nor even then unless the  
 Legatee make a demand of it - yet in  
 this latter case the authorities seem to be con-



tradiatory and it is laid down in one case that it 23  
cannot carry interest after a demand untill a  
Bill be filed or suit be actually instituted

But if a legacy be given by a parent to the child  
under age payable at a future time and no  
maintenance provided for such child in the  
Will it shall carry interest in the mean 26  
time for the parent is bound to make, 34  
provision for his child - but this principle 28  
extends no further than as relative to parent 36  
and child for if a legacy be given by a grand- 10  
parent to a grand child it is in the same si-  
tuation as if given to an adult

If a legacy given to ~~an infant~~ a person of  
full age and a time is limited the legacy is on  
interest from the time it is payable and if 36  
no time is limited in the case of an infant 41  
it is on interest after a year - of an adult af-  
ter a demand so that it is not on interest  
untill a year has elapsed - to this rule there  
is an exception - in all cases where the thing



given carries interest (as a Bond) the legatee shall be entitled to interest after a year as if A has a bond ag<sup>t</sup> B of £100 which he bequeathes to C. such bond shall carry interest at the end of a year. So in case of stock &c. or if a Legacy be chargeable upon land which yields rents and profits the legatee is entitled to ~~for~~ interest after a year. As if A devises to B and also bequeathes £100 to C out of the land devised to ~~B~~.

P.W. B. in such case C. shall receive interest of £6. the £100 after one year has elapsed.

The case cited in P. Williams serves to point out how far a Court of Chancery will enforce interest to be paid upon a legacy given to a child and no provision made for its maintenance. It is a case where a husband receives a legacy given to his wife when a child - to be paid her on marriage and there was no further provision made her in the will.



the husband in accounting with the Ex<sup>r</sup>. 25  
received interest from the time of payment  
only supposing he was entitled to interest  
only from that time and executed a release  
to the Ex<sup>r</sup>. of all demands and claims he  
had under the will - The husband afterwards  
being acquainted with his right he filed his  
Bill in Chancery to be relieved which was  
granted - This case furnishes a striking in-  
stance of a Court of Chancery's relieving against  
a transaction executed thro' ignorance of the  
Law and that by a man's own act.

It may be asked what becomes of the interest  
in the case above mentioned when the legatee  
cannot take it? If there be a residuary le-  
gatee it doubtless belongs to him: if there  
be no residuary legatee the Ex<sup>r</sup>. would be en-  
titled to it provided he had no ~~legacy~~ legacy  
given him and if the Ex<sup>r</sup>. had a legacy given  
him it would sink into the residuum & be  
distributed as the law directs - It has been  
before mentioned respecting specific and



pecuniary legacies — and now again  
Of pecuniary and specific legacies

A specific legacy points to some identical thing as a horse. Or so if a person ~~gives~~ gives money in a particular Drawer not specifying the sum it is a specific legacy — But when a ~~sum~~ sum of money is given in a will and no more said about it, it is a pecuniary legacy. It appears to be immaterial whether a legacy be specific or pecuniary as it relates to the Ex. for they both are liable in his hands for the payment of debts but if there be sufficient Estate for the payment of debts without the application of legacies and yet the Ex. will apply the legacies in discharge of the debts he shall be accountable to the legatee — but if the legacies be exhausted by the specialty creditors the Ex. may plead *plene administravit* — the Legatee may apply to the



27  
wastavit and the Legatee may resort to  
the heir to the extent of specialty debts so that  
a legacy is no more than an inchoate gift not  
vesting immediately in the Legatee but liable  
in the hands of the Ex<sup>r</sup> for the payment of  
debts - A specific legacy is also liable to be taken  
by Execution - but if an Ex<sup>r</sup> assent to a legacy  
neither he himself nor Creditors can dispose  
of it unless the legatee by negligence leave it  
in the hands of the Ex<sup>r</sup> - If the Ex<sup>r</sup> has committed  
waste in consequence of which the legatee is de-  
prived of his legacy and the Ex<sup>r</sup> pleads plene  
administravit the legatee may reply over a  
wastavit which throws the burden of proof up-  
on the Legatee and he must prove that there has  
been Estate wasted this being done he recovers <sup>the</sup>  
amount of his debt if so much has been  
wasted ~~and~~ and if more has been wasted he  
recovers ~~more~~ only the extent of his Legacy  
But suppose the Ex<sup>r</sup> has committed <sup>no</sup> waste  
and has paid the Legacies in discharge of a



specially debt The legatee in this case shall stand in the place of the specially creditors to the extent of their legacies

P.W.  
422

The Ex<sup>r</sup>. must first pay off specific legacies in toto and in the next place pecuniary legacies and if there be not sufficient to discharge these pecuniary legacies he must abate them as the law directs for there is no priority - but provided there be not sufficient to discharge the specific legacies it seems they are not to abate but are to be paid according to their ~~proper~~ priority yet in Chancery Cases there is a Case in which the specific legacies were compelled to abate - but the authority in P.W. is founded on different principles - Then according to these rules a devise of Land is also a specific for the land in the Will is pointed out and we have seen that Land in the hands of a Devisee is as much appropriated to the payment of debts as Land in the hands of the heir when bound by his



29  
ancestor and if legacies be exhausted for the  
payment of specially debts the legacies  
may resort to the heir: but a legatee can  
not resort to the devise because the devise  
is a specific devise (more properly than  
legatee) who claims a priority. So when  
there is a specific devise the specific legatee  
shall never contribute upon an average  
with the heir at Law towards satisfaction  
of creditors while real assets of the heir are  
sufficient. It is easy to conceive that spe- 305  
cific legatee may be totally deprived of his  
legacy by the specially or simple contract  
creditor and yet other specific legatees  
be entitled to their legacies as if I give  
to B a horse, to C a yoke of oxen and to D  
certain Mote and there is sufficient pro-  
perty to discharge all the debts except  
the value of B's horse which is taken by  
a creditor - B in this case is remediless  
and the other legatees shall not abate. but  
the law is otherwise respecting pecuniary



legatee and he cannot be deprived of his legacy by any accident as if a house be warrum by fire with a pecuniary legacy in it which is destroyed the legatee in this case does not loose his legacy provided there is property suff. to discharge it.

It seems that there is one case wherein a pecuniary legatee hath a preference to a specific legatee as if A give to B. C. D. all his estate ~~in~~ by specific legacies and then gives to E. £300 as a pecuniary legacy - this legacy shall be paid out of the specific legacies and they must abate amongst themselves - It is easy to see that the before mentioned principles may cause great injustice in the doctrine of legacies and oppose the express intention of the testator for a man may not be possessed of so large an estate as he supposes he does - ex. gr. a person gives a farm of Land to one of his  
son



and money to the same amount to the 34  
other when in fact the sum of land is all  
that is left of the testator's Estate after pay-  
ment of debts - the Devise of the Land  
being a specific one will take the whole  
of the land while the pecuniary legatee  
is deprived of any part of the Estate when  
the intention of the testator is manifest  
that they should share equally - When an  
Ex<sup>r</sup> pays a legacy and assets fail,  
payment of debts the legatee shall refund  
provided the Ex<sup>r</sup> has taken a security for  
that purpose or has paid it by direction  
of Chancery otherwise Chancery considers 2 V.  
him as having been ~~to~~ neglectful and 350  
will not compel the legatee to refund  
So if an Ex<sup>r</sup> pay a pecuniary legacy in  
full when assets fail to pay other legacies  
he is liable to make satisfaction - But 2 V.  
the creditor in the first case or legatee in 193  
last case may if the Ex<sup>r</sup> be insolvent cause



come directly ag<sup>t</sup> such legatee so paid & compell him to refund or the Creditor may pursue the assets and take them where he can find them - but he must resort to the ordinary course (viz), to the Ex<sup>r</sup> in the first place - The principle is precisely the same in case the debts are all paid & the Ex<sup>r</sup> has paid the remainder in satisfaction of one legacy - The Ex<sup>r</sup> must first be pursued and in the event of his failing the other legatees may compell the legatee who has been paid to refund -

It is apprehended the legatee ought upon principle to refund in all cases to the Ex<sup>r</sup>.

W<sup>t</sup> when new debts are discovered and that  
 R<sup>t</sup> the legacy so paid may properly be considered as money paid to his use and an action of indebitatus assumpsit will lie to recover for the nature of the payment is that it shall operate only in the event of the Estate's holding out.



There appears to be a case in Vernon where  
 Chancery compelled the legatee to refund  
 where the Ex<sup>r</sup> did not take bond but there  
 the Ex<sup>r</sup> took all diligence to see if there were  
 no more debts due before he made distribu-  
 tion of the Estate and after; ~~the~~ a debt  
 appeared and Chancery compelled the lega-  
 tee to refund.

When a legacy is due, given with a power  
 to some person to distribute, and if that  
 power be not reasonably exercised - Equity  
 will controul the power and when Chan-  
 cery does step in they generally distribute  
 equally among the children - As when a  
 man gave his two daughters £1000 vesting the  
 wife to dispose of it according to her discretion  
 one of which being a daughter in law she gave  
 only £100 and to the other £900 - In this  
 case Chancery ordered the one to refund to the other  
 and they should equally -

So again where there were 3 daughters whose father gave to 2 of them £400 each and empowered the Exr. to exercise his discretion respecting the 3<sup>d</sup> daughter - and he intended to give her but a mere trifle but there being Estate sufficient Chan<sup>y</sup>. ordered to her £400 -

There appears to have been in the books a question by whom was meant "Children" And the rule seems to be this - where the term has relation to the time of making the will and where not - in the first case children are living and in the last, not, at the time of making the will - as in case a will be made containing the expressions above mentioned and nothing more, it is to be supposed that the testator means to provide for the children only then in esse, as being the only objects at that time, of his bounty - if the testator ~~the testator~~ should have other children after the making the will and before his death



35  
should republish it - it would be supposable  
that he meant to make provision for the  
after born children - So if then be a devise  
to the "Children of such a person and at the  
time of making the will such person had no  
children it is clear that the testator meant after  
born children - So if a man give his Estate to  
the Children of two persons and there be only  
children of one of those persons - after born child  
ren are contemplated and the children take per  
capita - <sup>has been questioned</sup> It <sup>is</sup> that the word Children includes  
Grand Children as a devise to A's Children include  
his grand children - but the rule is established to  
be otherwise provided A has Children

Upon the strict intention of the testator the term  
"heir" has been construed differently - as if there  
be a devise to B for life and upon his death to the  
heir of J. S. which heir at the time of making of  
will was C. who died before the devisee and at  
the death of A the Devisee; D was in fact the heir  
of J. S. the question was did the Ex<sup>r</sup>. of C. the person  
contemplated by the testator or Q the heir of J. S. at  
the time of A's death take the Estate? and if

36 was determined that the Ex. of C took the devise  
that (2) should not take is clear because the testa-  
tor never had in view an after born issue: but  
that the Ex. of C should not take it is as clear  
for because the event of C's dying before the  
devisor makes ~~the legacy~~ the legacy is lapsed and  
goes into the residuum.

When a person gives his Estate to his relatives  
of very near relations are meant except those who  
§27. can take under the statute of Distribution (viz,  
Charles 2<sup>d</sup>. tho' in the first case of the kind relatives  
of every degree claimed a share and were let  
in - So when a devise is of all my Estate - all  
the personal Estate and that only passes which  
he dies possessed of altho' ~~my~~ acquired after the  
will is made - So again a will made to pass all the  
Estate at a particular place - all at that place  
passes at his death yet if specified there - all  
my goods, chattels, furniture and other things  
this does not pass money there for in this case  
the Chancellor observed that when the testator



made use of the words "other things" he meant 37  
such like things as he mentioned and therefore  
could not mean money ~

## Of the Ademption of a Legacy

This applies generally to specific legacies as  
where a man gives a horse &c to a legatee &  
before he dies he sells the horse or if a bond  
collects it - in some cases this will be an ademp-  
tion and in others it will not for sometimes  
Chancery will let in the Legatee upon the Estate  
of the testator - If the rules appear to be these  
if you can collect from the circumstances  
of the sale that the testator manifestly intended  
to deprive the legatee of the legacy it is an ademp-  
tion but if the conduct of the testator be such as  
clearly evinces that the legacy should still re-  
main with the legatee it is no ademption  
as if the horse be sold or the bond collected from  
necessity in order to pay debts or the like it is  
no ademption - So if a horse be pledged for the  
purpose of securing a debt it is no ademption

So if a bond be bequeathed and it be after  
voluntarily paid it is not an ademption, nor  
is it if taken by compulsion when it is mani-  
festly done to secure the debt: but if no reason  
can be assigned why aliened in the first ~~place~~  
instance or collected in the last case it is an  
ademption — There are instances in which  
a legacy is said to be adempted when it is lost  
by accident — as when a house is devised and  
afterwards blown down and destroyed or  
when a ship at sea is bequeathed and lost  
at sea — A person gave a house to a devisee  
much out of repair and in his lifetime made  
so many repairs as that not a stick of tim-  
ber of the house when built was left — The  
question was whether this was the same house  
that was devised? This case appears not  
to be determined — but in a case similar to this  
there was a determination — This was in a  
case where a ship was repaired so much in  
the life time of the Devisee as nothing was left  
except the keelson — This was determined to be



The same ship devised and therefore no ad 39  
emption of the legacy ~

There yet appears another class of cases which  
have been determined to be an ademption  
of the Legacies as when a man bequeaths  
a certain sum to his Children and after but  
before his death makes the same provision  
as an advancement or suppose he does not  
give so much as the sum of the legacy as an 2d  
advancement it is considered as an adempti 40  
tion pro tanto - as when a man gave his  
daughters in his Will so much each and  
before his death set them out in marriage  
and advanced to them for furniture &c the  
amount of the sum contained in the legacy  
this was held to be an ademption - So again  
a man gave his <sup>son</sup> by Will a legacy of £750  
and before his death bought him a commis-  
sion in the army and expended £600 by way  
of advancement the Court determined this  
to be an ademption for so much; but the  
monies laid out must be actually an ad

annuement for if it be only small sums  
for pocket money & it is no annuement

Cases in the Books are not uncommon of  
a man devising annexing a condition to  
the Devise - These are generally respecting mar-  
riages &c. - as a gift upon condition that the  
Legatee do or do not marry a certain person  
with consent of parents &c. and indeed there  
are cases upon condition that the legatee  
do not marry at all; but the rule establi-  
shed is that if the restraint be general that the  
legatee do not marry the legacy is good and  
the condition is void as militating ag-  
ainst sound policy - There however appears to be  
one case in which such a restraint is said  
to be reasonable and is so determined - This  
is when the husband gives a legacy to the wife  
upon condition that she do not marry  
again - This is upon the ground that in case  
if the widow should marry a second husband



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The children would be neglected in their edu-  
cation and she of course would loose her le-  
gacy - but as the event of there being children  
being the only ground to validate such a con-  
dition it is apprehended when there are no  
children the devise would be good and such  
a condition inoperative: but notwithstanding  
all this there are authorities which countenance  
this restraint and in some cases the whims  
of the testator have been indulged as to the  
time, place, and person: but this restraint  
must not go so far as to defeat the principles  
of law before laid down - Inst: a man gives  
a legacy upon condition that the legatee do  
not marry untill the age of 21 - This is such  
a restraint as Chancery will countenance  
but if the time be limited to 30 or 40 years  
it is apprehended the condition would be  
void and the legacy good for otherwise it would  
defeat the above principle - So as to the  
place the testator gave a legacy to his daughter

upon condition that she should not marry in York - she however married in York and brot her bill for her legacy: but the Court of Chancery rejected it by observing that since it was against the Will of the testator and she was not obliged to marry in York the testator should be indulged - As to the person: if the testator points out a particular person against whom he has an antipathy and therefore wishes his daughter not to marry him and gives her a legacy upon condition that she do not - the Court say that she shall be indulged in this restraint and if she marry such person she shall forfeit her legacy - this principle is carried still further - as if a man give to his daughter a legacy of £1000 provided she do not marry a papist but notwithstanding she marry the papist her legacy is forfeited - yet if the condition had been that she should not marry a protestant it would have been void: but a Papist being an object of inflexible hatred



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among mankind it was thought reason-  
able that the testator should be indulged in  
his restraints —

But in this place it may be remarked that  
a legacy given upon condition that a person  
shall not marry another of a particular  
trade or profession it is void & the Legacy vests

If a Legacy be given upon condition that he <sup>10th</sup>  
do not marry without the consent or advice <sup>40</sup>  
of B. it is considered as being only in terrorem  
and the legacy is vested but if it be limited  
over upon condition that he do not marry  
with the consent or advice of B. it is a good  
limitation and the first legatee provided he  
do not comply with the condition forfeits

his legacy — If a legacy be given to a minor <sup>P. 11</sup>  
it seems to be important to know <sup>2d</sup> ~~what~~ <sup>that</sup>

the Ex. is to do with it — it has been determined  
that he cannot pay it at his own risk for  
in the event of the father or guardian becoming  
a bankrupt he <sup>has</sup> it to pay over again —

if indeed he take a security from the father or guardian that it shall be paid over to the child when he shall attain to the age of 21 he has done his duty and cannot afterwards be called to an account or if he pay it over by the direction of the Court it will be done and he shall not be liable - The case cited in P. Williams is an extremely hard case - this was a case in which a legacy was given to a Minor, ~~A~~ son to a rich and flourishing merchant, at the time the legacy became due the Ex<sup>r</sup> paid it over to the father who afterwards rec<sup>d</sup> his son into partnership with him and they traded ~~to~~ together for a number of years when they both became bankrupts and their effects assigned over and the assignees filed their bill ag<sup>t</sup> the Ex<sup>r</sup> and he was compelled to pay it the second time - The safer way therefore for the Ex<sup>r</sup> is to apply to Chanc<sup>y</sup> and they



will see that care is taken - Where a legacy is vested and the Legatee die before payment it is transmissible - from this arises a question whether the Ex<sup>r</sup> must pay it immediately to the adm<sup>r</sup>. or whether the adm<sup>r</sup>. must wait till the day of payment ~~is~~ arrives and it has been determined that he must ~~wait~~ wait but if it be given to A and upon his death to B. it is vested in B immediately upon the death of A - If a Legacy be given generally to B without pointing out the time of payment and upon his death to C. such legacy is to be paid to B whenever his circumstances require it to be so. which are considered to be necessitous when he arrives to the age of 21 - or if he marry before that age - so if he die before that age or after it immediately vests in C and also becomes payable - So if a Legacy be given to the children of A generally and at the time of the

gift A has but one Child it vests in him  
 yet if he have after born children ever so  
 many the legacy is continually diverting  
 from the hands of the children and each  
 child at his appearance is entitled to an  
 equal share with the others ~

In England the Ecclesiastical Court formerly  
 had cognizance of all testamentary matters  
 and the Common Law Courts had no juris-  
 diction - However it is long since that a Court  
 of Chancery has assumed a power over legacies  
 yet the spiritual Courts do still retain the  
 power - A Court Chan: has taken cognizance  
 upon the Ground that the Ex: is a trustee  
 and therefore will compell him to perform  
 his trust and if he do not comply with their  
 Decree they will deal with him in the ordina-  
 ry way issue an attachment and even a  
 sequestration as the case may happen ~  
 In some cases a Court of Chancery has



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jurisdiction where the spiritual Court has none  
neither can have any - then are cases of  
legacies arising out of a sale of land, for the  
spiritual Ct. never was vested with any mat-  
ter relating to lands - if therefore legacies are  
given issuing from lands Chancery is the <sup>Palm</sup>  
proper forum to obtain redress - Altho' Courts <sup>120</sup>  
of law have no jurisdiction over legacies as men- <sup>in E</sup>  
tioned above yet if an Ex. assent to a legacy <sup>22</sup>  
it may be recovered at Common Law - So <sup>93</sup>  
again it was held by Holt. C. J. that a de- <sup>Salth.</sup>  
visee may maintain an action at Common <sup>41 1/2</sup>  
Law agt. a Tenant for a legacy devised out  
of Land; for where a Stat. as the Stat. of Wills  
gives a right the party consequently shall  
have an action at Law to recover it.

It may with propriety be remarked in  
this place that the judgment in an action  
brought by a legatee against the Ex. as having  
committed waste goes immediately agt. the

40 Ex. de bonis propriis on the ground that  
there is no property of the testator remain-  
ing in his hands ~

Of the surplus of the testators Estate  
after pay<sup>t</sup>. of debts ~

The Estate under these circumstances is to  
be distributed according ~~to~~ to the Stat: of  
Distribution in the reign of Car. 2<sup>d</sup>. - In  
order to understand the mode of distributing  
in this and all other of the States where  
the act of distribution is founded agreeable  
to the English the Stat of Car. 2<sup>d</sup> must be  
thoroughly understood - In the case of an  
intestate Estate the adm<sup>r</sup>. after pay<sup>t</sup>. of deb<sup>t</sup>s  
must distribute the remainder according  
to the said Stat: and the case is the same  
with regard to an Ex. when there is a resi-  
duum after payment of debts Legacies &c  
Antecedent to the Stat: of the 22<sup>d</sup> & 23<sup>d</sup> of  
Car. 2<sup>d</sup> it was the general rec<sup>d</sup>. opinion



49  
That the adm<sup>r</sup>. was not compellable to  
distribute the surplus - but that he has  
right to retain it himself as the ordinary  
did who formerly had the sole power of  
granting administration which was ar-  
bitrarily exercised till the Stat: of Hen: 8:  
which compelled him to grant administra-  
tion to the next of kin to the deceased: but by  
the above mentioned Stat: the adm<sup>r</sup>. is now com-  
pellable to distribute to the next of kin in equal  
degree - It is apprehended that this Stat: is  
only a detail at length of the old Common  
Law only enforcing the adm<sup>r</sup>. to distribute  
the surplus which antecedent to the Statute  
he had reserved to himself in open violation  
of the laws of the land: for under the old Saxon  
Law we find it a rule that  $\frac{1}{3}$  of the per-  
sonal Estate of the deceased went to the wife  
 $\frac{1}{3}$  to the Children and the remaining  $\frac{1}{3}$   
to pray the soul out of purgatory of his/her

to be there, about 2 years after this we find another Stat: of Ch: 2. called the Stat. of Trauers which gave the husband power to dispose of all the wifes personal Estate at his discretion provided she ~~did before~~ died before him and without a Will which power it seems had before been doubted - Yet this Stat: was in affirmance of the Common Law -

### Of the Statute

The Stat: of Distribution directs that where a man dies intestate leaving a widow and ~~any~~ children and there be a surplus of his personal Estate after payment of debts &  $\frac{1}{3}$  part of s<sup>d</sup>. Estate shall go to the widow and the remaining  $\frac{2}{3}$  to the children and their legal representatives ad infinitum if there be no children nor any legal representatives of them then one moiety to go to the widow and the other moiety to the next of kin to the intestate in equal degree and their legal representatives provided that no representation be admitted among col



laterals after brothers and sisters children:  
 if there be no widow the whole of the surplus  
 goes to the children and their representatives  
 and in default of lineal descendants to the  
 next of kin. By the terms "legal represen-  
 tatives" is to be understood that if there be  
 4 Children of J. S. and one dies leaving chil-  
 dren such Children are to stand in loco pa-  
 rentis making part of the old stock  
 and are to take what their parent would  
 have taken - but if all the children are dead  
 leaving unequal numbers of children they  
 no longer stand in loco parentis and take  
 by representation but take in their own  
 right ~~but in their own~~ per capita - So if one  
 or more of these Great G. Children die leaving  
 children these last again take per stirpes what  
 their fathers would have taken - The mode  
 of computation among collaterals is govern-  
 ed solely by the Civil Law and the manner  
 of computing is as follows beginning from

The propositus The Intestate, you are to  
 count up till you arrive at the common  
 Ancestor of him who claims a share of the  
 intestate's effects from thence you are to  
 count down untill you arrive at the  
 Claimant - Instance if T. S. die leaving 4  
 children and two brothers the Children  
 we have seen take in exclusion of every  
 body else: but there are no children and  
 the brothers claim as next of kin - and the  
 Statute you will remark directs it to go to  
 the next of kin in equal degree in order to find  
 who are next of kin among the claimants  
 you are to begin at the intestate and count-  
 ing up to the common Ancestor of the  
 claimants who is the father of the intestate will  
 be one degree, from thence to the brother will be  
 the 2. The brothers then standing in equal  
 degree to the Intestate and no other relations  
 living are entitled to the Estate





54 They take per capita as ~~at~~ before mentioned  
It has been determined under this Stat:  
that Brothers and Sisters take in exclusion  
of the Grand Father who stands in the same  
degree of kindred this was the case of Evelyn  
<sup>Look at</sup> and Evelyn determined by L. Holt - how  
this case could be determined agreeable to the  
Stat: of Car: 2<sup>d</sup>. which says "to the next of kin  
in equal degree - it is difficult to account for  
the Grand father and brothers stand all of  
them in the 2<sup>d</sup> Degree - exclusive of this prin-  
ciple the rules of descent have been sacredly  
adhered to - The Mother by the Stat: of James  
is degraded from her rank and put <sup>in the 2<sup>d</sup> Degree</sup> ~~in the 2<sup>d</sup> Degree~~  
<sup>by Stat.</sup> ~~with~~ with brothers and sisters in the 2<sup>d</sup> degree  
but when the brothers and sisters are dead leav-  
ing no issue the mother re-assumes her pri-  
or rank and takes the whole yet if there  
are children of brothers and sisters the mother  
~~is still considered~~ is still considered as being in the



2<sup>d</sup> degree forming a part of the old stock of 55  
course such children are to take per stirpes what Str:  
their fathers would have taken. Under this 710  
Stat: no distinction obtains between brothers  
and sisters of the whole and the half blood  
they both being in the second degree. To gain  
the Grandmother excludes the aunt.

It has also been determined that posthumous  
child of a brother shall share equally with the  
other children. The authorities to the above  
points are 1<sup>st</sup> P.W. 25. 31. 394 - 2<sup>d</sup> P.W. 344  
3<sup>d</sup> P.W. 49 - 1<sup>st</sup> Atk 456 - 1<sup>st</sup> Vez. 156. 333 - Str: 710  
Salk 30. 2<sup>d</sup> Vez. 213 - 1<sup>st</sup> Vent:

It may be remarked that in case the father  
and mother of the intestate are both living  
together with brothers - The Father takes the  
Estate in exclusion of the brothers being in the  
first degree.

### Of advancements to Children

Under the Eng: Law a child who has recd. an ad-  
vancement from his father shall not be intet

56. led after the father's death to a distributary share under the Stat: unless such Child will bring such advancement into batch (not I) he has his election either to do this or keep what he has and ~~to~~ run the risk of the other him taking more than himself for if then be more than sufficient to make others equal to him and he retains his advancement he can claim no part of the overplus - This perhaps may make a question in our law and that of other States where it is not a copy of the English law

It has been determined by a set of adjudications which have formed almost an entire system on this subject - which hold forth the idea that an advancement must be an actual furnishing a Child with some substantial property for a future support



57  
as a farm of Land &c for occasional presents  
to a Child as pocket money from time to  
time &c are not an advancement - so money  
for an education of a Child is not an advance  
tho' in some cases this may be questioned 317  
especially in this Country where <sup>the expenses of</sup> an educa-  
tion will amount generally to as much as  
the other children will have - So again  
to pay out money for a child to be an appren-  
tice is no advancement - but the father's buy-  
ing an office for his son, tho' at will, as a  
Gentleman pensioners place, or a commission  
in the army <sup>has been</sup> and are considered as advance-  
ments - So when the father makes <sup>provision in</sup> a marriage  
settlement it is an advancement - The case is  
the same where the child advanced is dead leav-  
ing Children - It is to be observed that the doctrine  
of bringing property into hotch pot is confined

strictly to an advancement made by the fa-  
 -ther for if the Child receive a benefit or gift  
 from some other quarter as an uncle, friend  
 &c he is not obliged to bring such given pro-  
 perty into hotchpot in order to entitle him-  
 self to an distributary share with the other  
 Children and this principle goes on still far-  
 -ther and if a Child be advanced by a mother  
 out of her own Estate such Child is still en-  
 titled to a distributary share with the other  
 Children without being <sup>in</sup> such advancement as  
 to hotchpot for it is said in the case cited that  
 the Statute does not contemplate an advance-  
 ment made by the mother it only speaks of  
 those who could have a wife and children -  
 Our Stat: is destitute of that provision as well  
 as the English and not a single case can be  
 found in which an advancement made by a  
 mother has been considered as being within  
 the Statute and yet it has never been questioned  
 but that a mother <sup>surviving</sup> ~~surviving~~ the father and



dying intestate is within the Statute as well 59  
as the Father -

Of a Will without and one with an Ex<sup>r</sup>.  
and when there is no Will made

In case of a Will without an Executor appointed - Administration is granted cum testamento annexo in which case the adm<sup>r</sup>. stands in the same place as an Ex<sup>r</sup>. would, invested with the same powers - But when there is no Will ad<sup>r</sup>. is by the Ordinary to be appointed and in this the Ordinary is not to exercise his own authority and wishes in the business but he is to conform ~~to~~ to the Statutes of Ed: 3 and Hen: 8<sup>th</sup> which direct him to appoint the widow or next of kin to the deceased and it is at his election whether to appoint or may if he pleases appoint both - finally he may go still farther and appoint ~~and~~ one to one part of the Estate and another to another

60 part - yet these adm<sup>ns</sup> are joint and the acts of  
Roll one bind the other and they must sue and be  
400 sued together - But if the intestate leave a  
36 -

bond of £100 the Ordinary cannot grant adm<sup>n</sup>  
for £50 to one and the other part to another  
because the bond is one intire thing &  
When there is no widow and a num ber are  
in equal degree the Ordinary may appoint  
one or more or whom he pleases adm<sup>n</sup> tho'  
with this exception whenever they are either  
Black: in the ascending or descending line those  
Em: in the descending are to be preferred -  
504.

It has been a question of litigation whether  
the 1/2 blood could be appointed adm<sup>n</sup> as well  
as the whole and now is determined that  
80 they may be admitted to adm<sup>n</sup> for the equa-  
105 lity of degree appears to be the criterion for

Salh: Ordinary to appoint and the Ordinary  
21 may grant adm<sup>n</sup> to a sister of the 1/2 blood  
or brother of the whole blood at his election



To this there appears to be an exception 61  
that if the female be married the Ordinary  
cannot appoint her as adm<sup>r</sup> in any case  
whatever on the ground that in appointing  
her he does not appoint the next of kin for  
the moment she be appointed it falls into  
the hands of her husb<sup>d</sup> of course exceeds the  
intention of the Statute - If an infant be  
entitled to adm<sup>n</sup> he must be appointed  
but the Ordinary must take care to appoint  
some other person adm<sup>r</sup> durante minore  
etate which lasts till the infant arrives  
to the age of 21 years but if an infant 251  
he may act at 17 years of age

This adm<sup>r</sup> for the infant, may be any  
person whom the Ordinary may please  
to appoint provided he be a discreet person  
If all the next of kin refuse to administer a  
Creditor may be appointed and if he refuse  
any discreet person the Ordinary may appoint

at his election. Of the death of an adm.  
 If an adm. die before he has completed his  
 administration his Ex. or adm. cannot  
 administer as to the goods of the former in  
 testate - but an adm. de bonis non must  
 be appointed who is to complete what the  
 former adm. had begun. But the case  
 as it relates to Ex. we shall find to be dif-  
 ferent where an Ex. dies leaving his ex-  
 ecutorship uncomplicated. Where there  
 are two adm. appointed and one dies the  
 administration survives to the other.  
 The duty of an adm. in England appears to be  
 much the same as it is in Connecticut. he is to  
 give bond & the conditions of which & is the  
 same of which ours is a copy. It is a general  
 opinion that upon the construction of the con-  
 dition of this bond the surety is bound for the  
 adm. in every point of view, that he make due  
 administration of the goods, or that if he will



not pay over the debts as the law directs, that 63  
the surety may be sued — But it is apprehen-  
ded that this is not the true idea. That the condition  
of the bond will warrant neither can it be sup-<sup>posed</sup> <sup>Mr. R.</sup>  
ported from authority neither can it be supposed  
that the common construction put upon it  
was the intention of the Legislature — but  
the only person liable is the adm<sup>r</sup>. and if he  
abuses his situation the C<sup>t</sup>. can displace him.  
The nature of this Bond is not that the adm<sup>r</sup>.  
shall pay over debts or to secure the Bankruptcy  
of the adm<sup>r</sup>. and the construction of the words  
"to administer truly according to Law" is that  
the adm<sup>r</sup>. shall return a true and perfect acc<sup>t</sup>.  
of his administration and the perform faithfully  
as it relates to the Ordinary and adm<sup>r</sup>.  
A creditor then cannot sue the bond and assign  
as a breach that the adm<sup>r</sup>. has never paid <sup>1. Salt</sup> 316.  
him his debt neither can he assign as a breach  
of the bond a devastavit for this he would do <sup>3. 4th</sup> 248.

on a suit to recover the debt against the adm<sup>r</sup>. Suppose the adm<sup>r</sup> has carried in a perfect inventory of all the property and will not pay to the creditor a debt of £100 which is due him still the creditor cannot sue the bond but the adm<sup>r</sup> alone is liable and can be compelled by a suit of another kind to pay the debt - but if the adm<sup>r</sup> has made a false inventory the bond is liable - and it appears the creditor is to run the risk of a devastant and not the bondman.

Of the revocation of an administrators power -

The power of an adm<sup>r</sup> may be revoked for a reasonable cause - and it ought to be remarked that if an adm<sup>r</sup> does not make out an inventory by the time appointed he forfeits his bond but the forfeiture is only for smart money as it is called.

This power as before mentioned may be revoked but if ~~there~~ there be no reasonable cause for a revocation the Sup<sup>r</sup> Court here will issue a mandamus and command the adm<sup>r</sup> to be restored to his former situation - Where ad



ministration is granted to wrong person or  
 granted where there was a Will, or the adm<sup>r</sup>.  
 becomes incapable to perform the trust or  
 runs away and leaves it not performed  
 the power given will be revoked -  
 formerly where adm<sup>r</sup>. was granted to a  
 person incompetent his acts were not con-  
 sidered ~~not~~ valid in law or if a Will after  
 wards appeared but now it is held otherwise:  
 the acts meant are sales of property &c  
 but if ~~property~~ <sup>property</sup> remains in his hands he  
 is liable for it and Trover can be tried for  
 it ~~unless he surrenders it~~ if he will not  
 surrender it and he can in this case be  
 sued at Law in such action as is adopted  
 to the nature of the property - If an adm<sup>r</sup>.  
~~and~~ under these circumstances has com-  
 menced a suit it must fail - but for the  
 after appointed ad<sup>r</sup>. or ex<sup>r</sup>. as the case may  
 be to recover the judg<sup>t</sup>. he must commence  
 a new suit stating the whole proceeding

of adm<sup>r</sup>. being granted - power being re-  
 voked and his being appointed in fact  
 tell the facts as they exist and bring *Sine*  
*vac*: on the judg<sup>t</sup>. and you will recover  
 Of the right of the adm<sup>r</sup>. over the property  
 of the deceased

The adm<sup>r</sup>. is vested with the same power over  
 the personal Estate as the Intestate himself  
 had, and may collect demands and release  
 debts, may retake property taken away by  
 wrong; finally <sup>almost</sup> all duties which were incum-  
 bent on the intestate ~~are~~ are incumbent  
 on the adm<sup>r</sup>. The adm<sup>r</sup>. however has nothing  
 to do with such actions as come within the  
 maxim "Actio personalis moritur cum persona"  
 Such as ~~on~~ torts committed upon the body  
 of the intestate and vice versa  
 Originally at common law the adm<sup>r</sup>. could  
 have no action for a trespass done to the per-  
 sonal property of the intestate: as taking away  
 his goods, killing his horse &c for these all



came within the before mentioned maxim. but <sup>of</sup>  
as to contracts the adm<sup>r</sup>. generally had a right  
to enforce them. By a Statute of Edward 4<sup>th</sup>  
a remedy was given to the Ex<sup>r</sup>. which he had  
not at Common Law. — The Equity of this Stat.  
was soon extended to adm<sup>r</sup>?. This was called  
the Stat. of De Bonis asportatis. The terms of  
this Stat. that no action could be brought only  
for goods of the testator which had been taken  
away, and this undoubtedly was the inten-  
tion of the Legislature, but Courts laid hold <sup>off.</sup>  
of the circumstances and the equity of the <sup>Ex<sup>r</sup>.</sup>  
Statute and thereby extended the remedy by <sup>9d.</sup>  
giving an action for all injuries done to <sup>(w<sup>o</sup> 377</sup>  
the personal property — and all the cases <sup>Lat.</sup>  
which are to be found in the books are foun-  
ded upon this Statute — yet notwithstanding  
this Statute, the action respecting an injury  
to the person of the intestate is as it was  
at Common Law falling within the before  
mentioned maxim. <sup>160</sup>

68c. The rule respecting the adm<sup>r</sup>'s liability to actions appears to be this - That whenever the testator's assets have been affected by the injury an action lies: but if they have not been affected by the injury no action lies - He is then liable for all the contracts of the testator tho' not for torts - This distinction will not, upon examination, be found to be a true one for he is not in all cases liable for contracts of the deceased, and in some cases he is liable for the torts of the dec<sup>d</sup>. - Then the rule as may be drawn from the authorities and the propositions laid <sup>down</sup> in the Common place writes upon this subject, appears to be this - "That as to torts, if they ~~may~~ be such as the dec<sup>d</sup>'s assets have been benefited thereby, then the ad<sup>r</sup> is liable, if not ~~benefited~~ thereby, then he is not liable - and whether there has been a tort or not is not the question - Inst. A kills B's horse thro' mere malice and dis: in this case



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A's Ex<sup>r</sup> or Adm<sup>r</sup>. is not liable for the assets  
of A have not been benefited thereby - but  
suppose A takes B's horse from pasture &  
it is not known what he has done with him,  
whether killed, sold, given him away or <sup>done</sup> any  
thing else with him - A dies - his Ex<sup>r</sup>. in this  
case is liable; the presumption is that the  
assets of A have been benefited and the Court  
will not presume otherwise and will not  
admit proof to rebut such presumption.

For injuries done to another person by  
the Testator as Assault and Battery, Slander &c  
the Ex<sup>r</sup>. is not liable for this falls within the  
maxim before mentioned *actio personalis mo-  
ritur cum persona* ~

Perhaps the equity of the above rule may  
be questioned and in all cases where the injury  
is vindictive such as Slander, Assault Battery &c  
it seems that the testator's property ought to  
be liable to respond damages ~ What gave

rise to the rule before mentioned was the mode  
 of prosecution: for altho' the adm<sup>r</sup> is liable for  
 torts by which the ~~induitatus~~ ~~property~~ ~~dead~~  
 property has been benefited - yet he is not li-  
 able to an action adapted to the tort done - as  
 if A takes B's horse and dies, his adm<sup>r</sup> is not  
 liable in an action of trover as A would have  
 been: but he is liable to an action on the case  
 adapted to the particular circumstances  
 of the case - This may be ~~perhaps~~ bet-  
 ter understood by attention to the case  
 reported in Cowper - Hamley and Trott  
 from which we may infer that an action  
 of indebitatus assumpsit may be brought  
 to recover the value of the horse: for A in his  
 life time might have brought Trover or in-  
 debitatus assumpsit and by his death the tort  
 also died: the rule therefore remains good as  
 to the indebitatus assumpsit: for A by the  
 very taking of the horse assumed upon him-  
 self to pay the value of the horse, this being

proper.



in the nature of a debt it is reasonable that  
A's admr. should be liable in such an  
action — The admr. is not liable for all  
the contracts of the intestate — He is liable  
for such contracts only which carry with  
them evidence that the ~~decd.~~ decd. has had a  
value received — inst: A promises for value recd.  
to pay to B \$100. — for such contract the admr.  
is liable — So again A promises for a valuable  
consideration to build B. an house this is suff.  
evidence to entitle B to an action — But  
such contracts that the decd. would receive no  
advantage from except by the act of perform-  
ance the admr. is not bound to fulfill, for the  
liability arising from the decd.'s own engagement  
or undertaking to do a certain act is not trans-  
missible to an Exr. or admr. but comes within  
the maxim "actio personalis moritur cum persona"  
inst: A meeting a merchant in N. York  
promises to collect a certain debt for him  
by such a time in the event of A not col-

lecting the debt at the time, he clearly is li-  
 able: But if no suit be brought during the  
 life of A it cannot be brought ag<sup>t</sup> A's ad-  
 adm<sup>r</sup> or Ex<sup>r</sup>, and of course the merchant  
 is remediless - for this comes within the  
 maxim "actio personalis moritur cum per-  
 sona" - So if A takes a Note and promises  
 to collect it and for which he gives a receipt  
 the rule is the same if he does not collect it  
 So again A being an officer to whom B  
 delivers an Ex<sup>r</sup> which he receipts in order to  
 collect within the time - A is liable if he  
 does not collect the Ex<sup>r</sup> - but if A dies before a  
 suit be brought B cannot recover for it  
 being a contract founded on the undertaking  
 of A: it comes within the maxim - actio de  
 personis. Upon this principle the Ex<sup>r</sup> of a Sheriff  
 is not liable for an undertaking of the sheriff  
 to keep a Goal in repair yet the sheriff upon  
 such <sup>an</sup> undertaking would be liable

coll

21

saund:

10



When the adm<sup>r</sup>. must sue as such and  
when not ~~~~~ 73

There are cases where the Ex<sup>r</sup>. or adm<sup>r</sup> has it  
at his election whether to bring a suit as  
such or in his own name alone. And this  
perhaps may better <sup>be</sup> explained by example  
Inst: we have seen that the adm<sup>r</sup>. has all the  
care of the personal Estate and it may hap-  
pen that this Estate may increase in his  
hands, as the interest of money arising, or  
the profits from the Estate &c in ~~all~~ such  
case he is to make an additional inventory  
of such after Estate and for these he may sue  
in his name alone: in short that debt or duty  
which grows by the act<sup>s</sup> of the adm<sup>r</sup>. may be  
recovered in his own name and when recovered  
is still property in his hands for the payment  
of debts - but when he sues for a debt or duty  
which arose during the life of the intestate  
he must sue as adm<sup>r</sup>.

If a Creditor be made adm<sup>r</sup>. he

may retain his debt tho' not to the prejudice of Creditors of a higher nature yet in some cases it may be important to be a Creditor to be appointed adm<sup>n</sup>. as if he be a simple contract Creditor and there are others still on the same footing - he may retain his own debt to their disadvantage - If the adm<sup>n</sup>. be a simple contract Creditor and there are specialties due he is just in the same situation as tho' he had not been appointed adm<sup>n</sup>. but if there are no specialties due he can better himself

Of that Estate which vests in the adm<sup>n</sup>.  
 The Estate vesting in the hands of the adm<sup>n</sup>. is that which is moveable - yet there is one species of moveable property which does not vest in the Ex<sup>r</sup>. or adm<sup>n</sup>. but descends regularly to the heir - as Deer in a park, Rabbits in Warren - Fish in a pond & Leases for years



are considered as personal property vesting <sup>73</sup>  
in the hands of the Adm<sup>r</sup>. so lands extended  
for the payment of debts are Chattels real  
vesting in the hands of the Ex<sup>r</sup>. or Adm<sup>r</sup>.

Of an Estate per autre vie

At Common Law this kind of Estate  
could not go to the heir of the person to whom it  
was given because there were no words of  
inheritance in the grant - it could not go to  
the Ex<sup>r</sup>. it being a freehold Estate - neither  
could it revert back to the grantor because  
he had completely divested himself of it  
by the grant of course it lay open to the  
first occupant untill a Stat: of Car: 2: was  
enacted which gave it to the Ex<sup>r</sup>.

In this State we have no such Statute re-  
specting it and the Stat: of Car 2 being  
too recently enacted to affect this Country  
of course the question may be litigated here  
yet and whether the Common Law of Eng?

would be here adopted & may be a question.

## Of the Emblements

Emblements are annual artificial profits growing upon the freehold such as Corn &c and grass if it be such as Clover sowed by the husbandman <sup>and all</sup> vests in the Ex<sup>r</sup>. - So all kind of Roots such as Parsnips &c pass to the Ex<sup>r</sup>. - Of things affixed to the freehold.

Such things as are affixed to the freehold as dyers kettles, stoves, Cranes in a Chimney &c are anciently depended to the heir: so it was the same as between Landlord and Tenant but the rule as to Landlord and Tenant seems to <sup>be</sup> somewhat relaxed and if the ~~Land~~ tenant so affixes a thing to the freehold as that as it can be removed without any essential injury he shall be permitted to remove it. finally he may remove it where the injury



ry would be great provided he will pay 77  
the damages: upon this principle (after  
Mills have been removed) The rule be-  
tween him and Creditor seems not quite  
so relax. Yet if the Ex. can remove a thing  
affixed to the freehold without an essential  
damage as a Crane affixed to the Chimney<sup>3 of</sup>  
as before mentioned he ~~may~~ may do it.<sup>23</sup>

### Of heir. Looms

Lowle  
Lowle

The things that are considered as heir looms are  
a Chest, Desk, &c used for the purpose of keeping  
title deeds &c and do not pass into the hands  
of the Adm. or Ex. but descend to the heir.  
So the Adm. or Ex. is not liable to the full  
Extent of his inventory provided he has in-  
ventoried bad debts and he may screen him-  
self by silent administration and by giving Rol  
the bad debts in evidence - as if he inventory<sup>915</sup>  
a Ship at sea which is lost he will not be  
liable to make it up in the inventory

How the adm<sup>r</sup> is to proceed in a suit &c. &c. &c.  
 Originally, at Common Law, if a suit had been commenced by the dec<sup>d</sup>. in his life time and before its determination died - the suit also died with him and so ~~vice versa~~ vice versa, tho the adm<sup>r</sup> might revive it by a new action; but the action commenced by the dec<sup>d</sup>. when living was completely annihilated and destroyed; but by the intervention of a number of Statutes the suit commenced by the dec<sup>d</sup>. is at this time kept alive and remains in the same situation <sup>as it did</sup> at the dec<sup>d</sup>'s death - The Statute of W. and M. the first upon this subject appears to be defective, which has not been remedied by any subsequent Statute - This Statute has made ample provision for the Pl<sup>r</sup> in a suit, but does not seem to have contemplated a Defendant - The adm<sup>r</sup>. in case a suit has been brought by his intestate pending



at his death, has nothing to do except 79  
to resort to the Court and enter his name  
in the Docket and cause to be added to  
the name of his intestate the word mortuus:  
So if y<sup>e</sup> (Defend<sup>t</sup>) had died pending the suit  
the Pl<sup>t</sup> may issue a fieri fac<sup>i</sup> ag<sup>t</sup> his Ex<sup>or</sup> or  
Adm<sup>t</sup> reciting the former suit & which  
fieri fac<sup>i</sup> attaches itself to all the cost that  
has arisen upon the suit to the present time:  
Thus far the Stat<sup>t</sup> has proceeded with pro-  
prietty - But if the de<sup>d</sup> has sued a claim  
for which there is no ground for a recovery  
and then dies and the adm<sup>t</sup> will not pro-  
ceed with the suit knowing perhaps the  
claim to be false - the Defend<sup>t</sup> in such case  
cannot enter ag<sup>t</sup> the adm<sup>t</sup> of the Pl<sup>t</sup> for  
the Cost that has arisen let it be ever so  
large a sum - This then is a *Casus omisus*  
in the Statute, in consequence of which great  
injustice may be done - It is however capable

of making a question arising from the words in the Stat: which are "The Ex: may enter" would <sup>it</sup> not therefore be equitable that the word "may" be in such case construed "must" altho' this would hardly come within the rules of construing the word "may" to mean "shall or must". It seems to have been a principle in the English Law that where the adm: sues in right of his intestate and fails of a recovery the defend: shall be allowed no costs. - This as a general rule: for there are cases in which he will be liable to costs as much as the intestate would have been: as when he sues for a debt or duty which has arisen from his own act since the intestate's death, as if he sues for interest of money which he has loaned &c and if in such case he sue as adm: yet he shall be liable for costs. In mortgages the interest that the mortgagee has in the Estate nominally goes to the heir yet if the mortgagee dies and the mort



gage be paid, it must be paid to the Ex<sup>r</sup>. 81

or Adm<sup>r</sup>. of the mortgage and is assets  
in their hands for the payment of debt &c  
So when the law day is past and the mort-  
gagor has still a mind to redeem he shall  
pay the money to y<sup>e</sup> Ex<sup>r</sup>. of the mortgagee  
and if he neglects to do this and pays it  
to the hirer the hirer will be considered as a  
trustee to y<sup>e</sup> Ex<sup>r</sup>. compellable in Chanc<sup>y</sup>.  
to fulfill his trust and even if the hirer  
obtain a foreclosure he is still accountable  
to the Ex<sup>r</sup>. for the rents and profits and may  
be compelled in Chancery to convey the  
land to the Ex<sup>r</sup>. unless he chooses to retain  
it by paying the mortgage money.  
It appears to be an unsettled question  
whether an Ex<sup>r</sup>. or Adm<sup>r</sup>. has any right  
or interest in an apprentice of the dec.  
It is apprehended that as he cannot upon  
English principles be assigned over to

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m.  
B.

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167  
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another person the Ex. or Adm. has no au-  
thority over him, hence it would seem un-  
reasonable that they should be bound by  
any covenants entered into by the dec.  
yet the authorities on this subject are con-  
tradictory.

### Of Ex. and Adm.'s duty

The Ex. or Adm. having inventoried the  
Estate in the first place is to pay the fu-  
neral expences - after which the debts of the  
dec. according to their priority of rank before  
mentioned - as 1<sup>st</sup> debts of the Crown - in doing  
this he is <sup>not</sup> to pay fines and amerciaments  
2<sup>d</sup> Those debts which are provided for by  
the Statute as debts due for the last sick-  
ness &c. 3<sup>d</sup> all debts of record, as debts on  
judgment &c. 4<sup>th</sup> debts by specialty as  
bonds, notes &c. and 5<sup>th</sup> all simple  
contract debts as the law directs - The  
Adm. as it relates to this may be in a  
critical situation - he is to pay debts - but he is  
to find out whether they be real debts or



not, for if the claims be unfounded and 83  
he discharges he will be liable to restore  
it; this is a general rule: yet if he has used  
due diligence and care to inform himself  
of their legality he will be excused: and  
when debts appear to him doubtful he  
may file his Bill in Chancery and call  
in all the creditors and the Court will ex-  
amine the claims and determine whe-  
ther they be just or not, after having done  
this they order the adm. to pay over in  
which case he will be ~~safe~~ safe.

The adm. is not obliged to take every  
legal advantage to avoid a claim: for  
inst: he will not be compelled to plead <sup>Ma</sup>  
the Statute of Limitat: in It is laid down <sup>un</sup>  
in Bacon that an Ex. must take advan <sup>tit</sup>  
tage of an usurious contract: but this  
may be questioned since the testator was  
not obliged to do it: the most <sup>y</sup> can be made  
of it is that if he will take advantage of

of it so far as to avoid the payment of  
usurious money he ought to be liable

## Of an Ex<sup>r</sup>. de son tort

This is an Ex<sup>r</sup>. called in his own wrong and  
is one who without any authority under  
the Will or from the Ordinary deals with  
the property of the dec<sup>d</sup>. in the same manner  
as a lawful Ex<sup>r</sup>. or adm<sup>r</sup>. would deal with it.  
Were there no law upon this subject we  
should be lead to conclude that such an  
Ex<sup>r</sup>. would be a mere trespasser only  
but an action may be commenced ag<sup>t</sup>.  
in by the creditors as tho' he were a lawful  
Ex<sup>r</sup>. yet the form of the action is different  
for he is described as being an Ex<sup>r</sup>. of a man  
who had no last Will and Testament. he  
is liable like any other Ex<sup>r</sup>. to the extent  
of assets and may shield himself by plea  
ding plene administravit - This Ex<sup>r</sup>. has not



the same privileges of other Ex<sup>rs</sup> for he <sup>is</sup>  
cannot retain his own debt and when  
he pleads *plene administravit* he cannot  
give in evidence that he had £1000 pro-  
perty that he has paid out £900 and  
retains £100 for his own debt; for were  
this the case it would be an object among  
creditors to get the Estate into their hands.  
It is settled law that there can be no Ex<sup>r</sup>.  
De son tort where there is a real one or ad<sup>r</sup>.  
appointed for in either case he is a mere  
trespasser - to this there is an exception  
Inst: there is a certain kind of Estate  
that the Ex<sup>r</sup> has nothing to do with:  
as if the testator in his lifetime has  
made a fraudulent conveyance of per-  
sonal property - over this the Ex<sup>r</sup> has no  
power for he is bound by a Stat: of Eliz:  
which declares all fraudulent contracts  
good ag<sup>t</sup>. the grantor, his Ex<sup>r</sup>, ad<sup>r</sup>, heirs, &c.

yet the conveyance is not good ag<sup>t</sup>. Creditors — This principle applies itself to a Donatio causa mortis which is a gift of the testator to some person when the testator is on his death bed on condition to revert back ~~on condition~~ provided he recovers however this law implies and this is not good ag<sup>t</sup>. Creditors for voluntary conveyances generally are not good ag<sup>t</sup>. Creditors but are good ag<sup>t</sup>. the Adm<sup>r</sup>. &c and he has no right to make an inventory of it.

Of the testators power to dispose of his personal property.

Every person by the laws of the land except those under legal disabilities may dispose of his property as he thinks proper. It would occur to the mind then of every man who is a stranger to the law how far —



such <sup>disposition</sup> power of property extends - can he create a  
perpetuity to endless ages? In answer to this the  
law has prescribed certain bounds beyond which  
he cannot go. The orig<sup>l</sup> Common law idea was  
that a man could not transmit his personal  
property further than to the first Donee and  
that the ~~prop~~ property vested absolutely in him  
but it is ~~now~~ now settled law that a man  
may <sup>2</sup>mit his property to as many per-  
sons as he pleases provided they all are in  
esse at the time he makes his Will so it may  
be limited to a person unborn vesting in him  
at the age of 21 - It is also settled that the  
use of personal property may be given to  
one and the fee (to use the word improperly)  
to another, and in this case the second Donee  
takes the whole - But there cannot be  
an entailment of personal property. be  
cause it would create a perpetuity for it  
cannot be barred by Fine and Recovery  
But the term "Fines" in this State having

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2 Vol

Blaw

Corr

396

2 Br

in (h

33:1

a different signification from the same word in England and if an Estate be given to a man and his heirs the heirs take an Estate in fee after the first Donee and it seems that it may be questioned whether personal property may not be given to and his heirs and the heirs ~~take~~ take an absolute Estate after the first

## Donee — Of the Statutes of Mortmain

In consequence of these Statutes no land could be given to Corporations — The design of them were to prevent persons property from being engrossed by the ~~Land~~ of the ecclesiastics to the exclusion of the rest of the community for lands thus given were said to be given for pious uses &c. But at and soon after the reformation a different construction was given to those Statutes and it was held that they extended no further than to



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to prevent lands from being given for  
superstitious purposes and that lands  
given for public utility did not fall with  
in the Statute. Yet still considering this an  
evil a Stat: was made in the reign of George 2.  
declaring that all devises for a publick  
or superstitious use was within the Stat:  
of mortmain and consequently void.

In Connecticut no such Statute exist  
therefore a devise to a Corporation would  
be good. Attempts have been made  
to evade these Statutes by bequeathing  
money to be laid out in land - yet this  
method has been held to be within the  
Statute. But a devise to an University  
or College is an exception to the Statute.

Of persons incapable of making  
a Will

Persons of non sane memory arising

from any cause whatever; as a person in-  
 toxicated with liquor &c - So the Wills of  
 persons <sup>without</sup> Deaf, Dumb or blind if it is in  
 proof that such persons could be understood  
 from signs &c will not be void - So the will  
 of a blind ~~man~~ or an unlettered person is good  
 if written and read to him and it be ac-  
 cording <sup>to</sup> his intention - Many times  
 Wills made under the influence of threats  
 have been vacated - yet duress is not a pro-  
 per criterion and how far threats would  
 operate to vacate a Will is not ascertained,  
 but it is apprehended that wherever a  
 person is imposed upon in such ~~a~~ man-  
 ner as to prevent a freedom of choice the  
 Will would be void and this seems to com-  
 port with the cases; for almost all Wills  
 made under any kind of threats have been  
 vacated - Fraud in the making of  
 a Will has always been considered as ~~a~~ total  
 destruction of the Will which goes upon the



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ground of imposition ~~and~~ and is operative  
in a Court of law - The case of Windham &  
Chetwyn in Burr: goes upon the ground <sup>Burr</sup> 414  
that a Court of Chancery in such case has  
no jurisdiction: yet there are cases in which  
a Court of Chancery have established a Will  
even where fraud has been used - Fraud  
operates more strongly in a Will than in a con-  
tract for the least fraud in a Will renders it void  
and the person who made it died intestate;  
But to this there appears to be an exception, that  
where a fraud is used, ~~common~~ commonly call'd  
a pious fraud, the Will notwithstanding  
will be good - as where a man being about to give his  
Estate to a profligate fellow and so far deceived  
that he devised <sup>ing</sup> he <sup>so</sup> much influenced, ~~that~~  
~~and~~ his property to his wife and children.

There are certain criminals in the English law  
whose Wills are void tho' not on the ground of incapa-  
city as is commonly supposed but because that  
they have no property it being forfeited to the

9<sup>th</sup> thing by the criminal act of which he has been guilty such as Treason, Felony &c.

The great maxim in the English Law is principally to govern which is that the intention of the testator is to be pursued when it is consistent with the rules of Law - Then the only question which can arise is when does the intention come within the rules of Law: Some have supposed that if the testator makes use of technical expressions in a Will which the Law does not admit and yet it is clearly understood what was his intention that such intention cannot be pursued and this entirely defeats the maxim - Inst: A gives to B and the heir of his body an house - in this case it is clear that A intended to give the house to A and his heir then living and in being which he might do but the Law has said that such expressions create an estate in tail which cannot be done in personal property - The true construct of this maxim is a



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prehended to be that if the intention of the  
testator was legal it shall be pursued let him  
make use of what expressions he will, and if he  
does use unapt words to convey a legal in-  
tention, still the intention shall govern: yet  
there are cases where the intention would be  
totally repugnant to the rules of law and therefore  
not to be pursued as if A devise to a person  
and the heir of his body and declare that  
such Estate shall not be docked the intention  
in this case is not to be pursued it being in-  
cident to an entailed Estate to be docked  
So if A gives to B ~~and~~ and the heir of  
his body his library of books to descend to  
them ad infinitum - the intention here is  
clearly repugnant to the rules of Law that  
personal property cannot be given to utter  
a perpetuity. The intention therefore is  
only applicable to the subject matter and  
the Court have only to enquire whether the  
devisor could thus devise.

## Of the admission of parole testimony to explain a Will

As a general rule it is laid down that no parole proof can be admitted to explain an ambiguity <sup>which</sup> arises from some matter extraneous from the Will parole proof will be admitted to explain it: Inst: A devises to B's son Jn: and it happens that B has two sons of that name this being an extraneous circumstance to the Will parole testimony will be let in to shew which son he meant - But if A give an Estate to B when he designed to give it to C parole proof will not be let in - The case cited in Brown: clearly admits that parole testimony may be let in to explain an ambiguity arising from the face of the Will - from the disposition of the property then given L<sup>d</sup> Chancellor Shulton observed that the testatrix had not expressed by the Will what she intended and on this ground parole testimony was let in



she had given property which if one construction was given the Will would amount three times as much as she was worth and the legates would be deprived of their ~~the~~ legacies but if another construction was given the legacies would be paid. The Chancellor let in parol proof to ~~ascertain~~ ascertain the state of her property in order to give a right construction to the Will he did not let in proof to ascertain the persons to whom the Estate should be given for this was already done but to determine which of the persons ought to take. It is apprehended that this furnishes ample ground to say that any facts may be proved to give a construction to ambiguous expressions in the Will.

### Of the requisites to a Will

To make a Will of lands <sup>real</sup> it is requisite <sup>if</sup> there should be three subscribing witnesses but in a

96 in a Will of personal property three witnesses are not necessary, if signed by the testator it is sufficient to pass the property and it is immaterial in what part of the Will the ~~name~~ name of the testator be written provided it be in any part to make sense in ~~the~~ reading the Will. It is not absolutely that the name of the testator be in any part of the Will as the case may be - Inst. A Will was found in which there was no name and in this case parol proof will be let in to shew that the testator acknowledged the same to be his Will. So where the testator did not write his Will himself neither was it signed but it appeared in proof that he gave directions and afterwards acknowledged the same to be his Will and was held to be valid.

Of those who may be Executors

An Infant may be appointed Ex. tho'



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He cannot act untill of the age of seventeen  
and all acts done by him as an Ex. are  
binding which in other cases would not be so  
as if He releases a debt - yet if he releases  
a debt which has not been paid his infan-  
cy still protects him and he may plead it  
and avoid the release

Persons incapable of acting are Idiots Lunatics  
&c who cannot act as Ex. and if appoin-  
ted must be displaced - yet no profligacy  
of manners will prevent an Ex. from ac-  
ting unless it be such as leads to the destruc-  
tion of the property. In England if an  
Estate be given to the wife generally it vests  
in the husband but in order that she alone  
shall have it, it ought to be expressed thus  
"to her sole and separate use" then the hus-  
band can have no right to it. This  
seems to <sup>be</sup> opposed to that inviolable rule that  
"a feme covert cannot hold property in pos-  
session but in her husbands yet it may

98 <sup>seems</sup> right that such a bequest ought to be good  
Under the head of Legacies it ought to be ob-  
served that when a legacy is given provided  
he marry such a person ~~a person~~ which le-  
gacy is to issue from land, it is not consi-  
dered as being in terrorem and if the  
the party marry contrary to the Will of  
the testator the Legacy is void.

### Of a Donatio causa mortis

114 <sup>Very</sup> This is a gift upon condition to revert  
back to the Donor and needs not the assent  
of the Ex<sup>r</sup> in order to have it pass to the donee  
but it vests immediately in him. If it  
be a donation of horses &c upon a certain  
sum it will not pass for it must be such  
property as was in the immediate posses-  
sion of the Donor at the time of the gift  
and must be actually delivered over to the  
donee. It is a question whether a bond  
can be given as a Donatio causa mortis?



If it can the Ex<sup>r</sup> has nothing to do with 99  
it - The case in P. Williams is a case of a  
bond being given as a Donatio &c and  
held to be good

## Of nuncupative Wills

A nuncupative Will is a disposition of the  
testator's personal Estate by an oral declara-  
tion of his while in extremis before a suff<sup>t</sup>  
number of witnesses and afterwards reduced to  
writing - From the writers upon this subject  
it seems to have been usual for men to reduce their  
Wills to writing yet at Common Law this was  
not required - There is not to be found in Cornue-  
ticut an instance of a nuncupative Will with-  
in the knowledge of M<sup>r</sup>. Reeve - perhaps it may  
therefore be questioned whether from the constant  
and universal practice of reducing Wills to writ-  
ing there could exist such an ~~instrument~~ <sup>will</sup> in  
this State as a nuncupative <sup>will</sup> or if it could exist  
to what extent?

300 The 24<sup>th</sup> of Charles 2.<sup>d</sup> that is the Stat. of Frauds  
Black: and Fugures has laid certain restraints upon  
Corr: a nuncupative Will (viz) It shall not alter or  
301. revoke a former Will written unless reduced to  
writing in the lifetime of the testator, read to &  
approved by him and also proved by three  
witnesses - A nuncupative Will cannot  
give away a sum exceeding £30 unless proved  
by 3 witnesses who were specially required to  
bear witness thereto and by the testator him-  
self and made in his last sickness in his  
own dwelling house or where he had previously  
by <sup>him</sup> resident 10 days - A Will of this kind  
cannot be proved after the space of six months  
from the making unless reduced to writing within  
in six days - nor shall it be proved 14 days after  
the death of the testator nor till process hath first  
issued to call in the widow, next of kin or some  
person interested to contest it if they think pro



101  
her - There appears to be an important principle  
in the English law which it is apprehended does not  
comport with their own principles - Instance  
It is an established rule in the Eng. Law that if  
a man makes a Will not with the requisites to  
pass the ~~real~~ Real but at the same time suf-  
ficient to pass personal - it is settled and the au-  
thorities are that such a Will will pass the person-  
al Estate and as to the real it is intestate Estate  
This is directly in opposition to the manifest in-  
tention of the testator and that principle in the  
law which declares that the intention of the tes-  
tator shall be pursued - and in this instance  
mentioned a part of the intention only is com-  
plied with - By this defeating the intention  
in many instances great injustice may be done  
especially under the Eng. Law - Example - A  
having 3 sons and as many daughters he  
devises to his 3 daughters £3000 personal Estate  
and £3000 to his sons real Estate the will signed  
by 2 witnesses only - in this case the personal Estate

passes by the Will - the real is intestate of course -  
 The eldest son takes all while the other two  
 sons share none of the Estate and of course that  
 provision which was intended by the father is  
 absolutely defeated - but if the will was made  
 void for such defect into the unfortunate two  
<sup>would come in</sup> sons, for a distributive share of the personal  
 Estate, And says Mr. Reeves in a case of a  
 Will like this I would always contest the point  
 for it may be supported from principle and  
 justice altho' not from English authority but  
 that says he does not militate ag<sup>t</sup> contesting  
 the point when opposed to principle.

Of the power of an Ex<sup>r</sup> before probate of  
 the Will

The situation of an Ex<sup>r</sup> is materially different  
 from an adm<sup>r</sup>. An adm<sup>r</sup> can do no act till  
 the probate of the Will but an Ex<sup>r</sup> deriving  
 his authority from the Will may do any act be-  
 fore the probate of the Will that he can do after,



with a single exception - he cannot sue; for the Will is not considered as being sufficient to warrant an action without the <sup>sanction</sup> ~~sanction~~ of the ordinary: but he is liable to be sued and may release debts &c. And when he has done any thing as an Ex. he is considered as having accepted of the trust and cannot refuse to act as an Ex.

If the Ex. will <sup>do</sup> no act indicative of the acceptance of the trust of Ex. The Ordinary may issue a Citation commanding his appearance before him where he may accept or refuse, if the latter an adm. cum testamento annexo is <sup>to be</sup> appointed - If the Ex. on such Citation will ~~not~~ <sup>neither</sup> appear ~~and~~ <sup>nor</sup> ~~neither~~ accept of the office the Ordinary will use his death-bed instrument (viz) excommunication; but in this State the legislature supposing a fine of £5 p. month a much more effectual method to effect an appearance of the Will before the probate Court - after 30 days had expired from the

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death of the deceased

Of the difference of the law when 2 Ex<sup>rs</sup> are appointed &c

If there are two or more Ex<sup>rs</sup> and one only proves the Will and the others refuse this refusal shall not ~~prevent~~ prevent them doing any act that an Ex<sup>r</sup> may do and a suit must be brought by them all; but not against them all - but if a suit be bro<sup>t</sup>. ag<sup>t</sup>. those who never proved the Will neither acts as such, he may plead "never Ex<sup>r</sup>." Where there are two Ex<sup>rs</sup> the one refuses and the other proves the Will tho' he who refuses may afterwards come in, yet if he never acts before the death of his co-executor he never can afterwards act. so that if ~~an~~ an Ex<sup>r</sup> dies his office will devolve upon his Ex<sup>r</sup>. therefore the last will be Ex<sup>r</sup>. upon the first testator's Will but this power does not extend to the adm<sup>n</sup>. of an Ex<sup>r</sup>. Notwithstanding the Ex<sup>r</sup> of an Ex<sup>r</sup> is Ex<sup>r</sup>. on both Wills yet he may



accept of the last appointment and refuse the 105  
first but if he do an act which constitutes him  
Ex<sup>r</sup> of the first testator <sup>will</sup> he must act upon both  
and if he do not act upon the first an Adm<sup>r</sup>  
cum testamentis annexo upon the goods of  
the first testator. Estate de bonis non

If there be two Ex<sup>r</sup>s and both accept of the  
trust and one of them dies leaving an Ex<sup>r</sup>.  
the whole trust devolves upon him the sur-  
viving Ex<sup>r</sup>. and this last Ex<sup>r</sup>. has nothing  
to do with the Estate of the first testator

There are two acting Ex<sup>r</sup>s one dies leaving an  
Ex<sup>r</sup>. and the survivor takes the Executorship:

soon after the survivor dies intestate - the Ex<sup>r</sup>.

of the first Ex<sup>r</sup>. cannot act as Ex<sup>r</sup>. to the former

will: for upon the death of his testator the <sup>off. Ex<sup>r</sup></sup> 101

executorship completely vested in the survivor

and upon his death an adm<sup>r</sup>. de bonis non:

It has been before mentioned that an Ex<sup>r</sup>. would

be liable for waste de bonis ~~non~~ propriis

106. but if there are 2 Ex.<sup>rs</sup> each one is liable  
separately for assets which they have received  
if therefore one badly commits waste unknown  
to the other he alone is liable de bonis propriis  
Inst: One has rec<sup>d</sup> £1000 - £300 of which he  
has wasted - both Ex.<sup>rs</sup> are sued they plead plene  
administravit or rather administraverunt; in  
such ~~the~~ case the Pl.<sup>t</sup> may reply over devastave-  
rent ~~in such~~ and j<sup>dg</sup>. will pass ag<sup>t</sup>. the one  
who has committed the waste but if one has  
received £1000 and they jointly give a receipt  
for it and it is afterwards wasted by the one  
receiving they are both liable for such waste:

Calth. ~~but~~ So if one has rec<sup>d</sup>. property and delivered  
110. to the other and he wastes it both are liable.  
It was formerly a rule that when two Ex.<sup>rs</sup>  
gave a receipt for property and one of them  
wasted it both were liable to creditors but  
the ~~act~~ actual receiver of it was the one only  
liable to Legatees - this distinction seems



now to be exploded — As to revoking the  
power of an Ex. the law is different from that  
of an Adm. and if the Ordinary has appointed  
an Adm. who is in failing circumstances his  
power may be ~~revoked~~ but if one has been  
appointed an Ex. to who is in failing circum-  
stances his power cannot by the spiritual be  
revoked nor in any other case except that of  
insanity — Neither can the ordinary  
compell the Ex. to give bond for the testator  
has thought him capable of transacting the  
business but upon an application in Chan-  
cery the Ex. may be compelled to give bond.

After the Ex. has accepted of the Executorship  
he must go before the Ordinary and prove  
the Will which in the vulgar form is only  
swearing upon oath that he believes such  
a Will to be a true Will of the testator — If the  
Will be of real property only the Ex. must go  
before a Court of Chancery and if it be disputed

The Will shall be ~~de~~ proved in due form of  
 law which is citing the party, viz, the next of  
 kin and the witnesses and then make their  
 objections if any they have - And the wit-  
 nesses are separately and privately examined  
 their testimony written and handed to the Ordinary.  
 A Will being once proved cannot ever after  
 be called in question: ~~but~~ but if proved by the  
 vulgar form it may at any time be ques-  
 tioned - If the Ordinary refuse to admit  
 the Ex<sup>r</sup> to prove the Will or to grant adm<sup>n</sup>.  
 he is compelled so to do by a mandamus  
 from ~~by~~ the Courts in Westminster Hall - and the  
 Ordinary must obey unless he makes a suff<sup>t</sup>  
 return as that the Ex<sup>r</sup> is insane &c.  
 There are many instances in which the  
 Ordinary must grant adm<sup>n</sup>. ~~not~~ notwith-  
 standing there be a Will and an Ex<sup>r</sup> be  
 thereby appointed - as an Administrator  
 durante minoritate, durante absentia &c.



109  
So if two Ex<sup>rs</sup> are contending about the  
executorship - adm<sup>n</sup>. must be granted, pendente  
lite - Of the payment of debts

Will. 24  
When real property is devised for the payment  
of debts the personal fund is to be exhausted first  
unless something more appears than barely the  
devise; as that the Testator intended his personal estate  
should be eased of the burden - This is said to com-  
ply with the intention of the Testator, but it is W<sup>th</sup> R<sup>ed</sup>  
apprehended to be directly ~~of~~ opposed to it, for  
had he designed the personal property for the  
payment of debts he would not have devised  
his real for that purpose, when the personal  
fund was more than sufficient; the testator  
therefore intended to have eased the personal  
property of the debts that it might be distri-  
buted among his children - If a man  
make a devise for the payment of all his debts  
(L<sup>rd</sup> Mansfield says that) such devise includes debts

of every description as well those barred by the  
 Stat: of Limitat: as those not barred: and  
 the general rec<sup>d</sup>. opinion has been that it  
 included them because it was an acknowledg-  
 -ment of the debt and therefore took it  
 out of the Statute: but it is apprehended <sup>that</sup>  
 the true ground is that the debt is still an existing  
 one in <sup>the</sup> conscience and the testator to prevent  
 litigation devised them to be paid and it is ap-  
 prehended that all the authorities are reconcilable  
 to this doctrine and the true idea is that by  
 an acknowledgement of the debt the advan-  
 tage that might have been taken from the  
 Statute of Limitation is waived and the gen<sup>l</sup>  
 presumption which <sup>is</sup> said to prevail is not the  
 true one that a debt within the Stat: of Limitat<sup>n</sup>  
 is presumed to be paid but the most that can  
 be said is that the Stat: of Limitat: puts an ad-  
 vantage into the obligors hand to avoid his  
 debt if <sup>he</sup> soes cause - because if the presumption  
 that the debt was paid is the ground any evidence



that would rebutt such presumption would  
 be good and this has not been the case in  
 any instance where the presumption was re-  
 butted that the Statute of Limit. did not pre-  
 vail where it would apply whether the  
 evidence was rebutted or not except the con-  
 tract was revived by a new promise and on  
 this <sup>point</sup> agreeable to the general rule the old  
 contract is not revived but considered only  
 the consideration of the new promise and <sup>Mr</sup>  
 that the action to recover ~~on~~ must be bro't <sup>Be</sup>  
 on the new promise but apprehend it must  
 be bro't on the old one because in the very  
 terms of the expression <sup>say</sup> they the old con-  
 tract is revived if so an action is to be bro't  
 upon it.

If real property be devised for the paym't  
 of debts due by simple contract not on interest, they  
 will from that time carry interest.

# Observations upon the Law of the State of N. York as it respects this subject

N. B. It will be necessary to mention where there is no difference pointed out between the English Law and the Law of N. Y. and of Connecticut ~~that~~ it is the same

As in England the real property depends to the heir and the personal to the Ex<sup>r</sup>. But the heir ~~or~~ <sup>or</sup> devisee is liable to any ~~contract~~ <sup>debt</sup> or simple contract as well as others

It is apprehended that it will make considerable question in N. Y. State whether the heir is liable to creditors out of his own property or whether the <sup>only which</sup> Estate descended to him from his ancestor is liable as there appears to be no Statutes respecting it. When the personal Estate is not sufficient for the payment of debts the real may be sold by order of the Judge of probate and the money is legal assets in the adm<sup>r</sup>'s hands and must



~~and~~ be paid out according to the priority  
of rank of the debts - then we clearly see that the  
object of their law is that all debts shall be paid  
and that <sup>neither</sup> the heir nor any other person shall  
run away with the Estate the debts remaining  
unpaid but if there be property sufficient they  
at all events shall be paid - If the heir claims  
the property which depends to him the same provi-  
sion is made in N. York as in England that is  
the heir shall be liable out of his Town property  
but when the Estate is insolvent and the whole  
real property must be sold then the money is to be  
all paid into the hands of the Court of Probate  
and is equitable assets to be paid out to the  
creditors pari passu without preferring specially  
creditors to others - Adm<sup>n</sup> is granted to the next  
of kin according as the Statute of Hen. 8<sup>th</sup> directs:  
Distribution is to be made in the same man-  
ner as is directed by the Stat: of Charles & Jas: with  
this difference that children advanced keep what  
they have got <sup>ten</sup> without bringing it into hotch-potch  
and it is accounted as making up a part of their

114 share - Bonds are given in N.Y. as in Eng?  
Legacies are to be tried in the State of N. York  
before the Court of Probate who has the same  
power as the spiritual Court in England and  
even more for he is to guide himself by the law both  
of the Spiritual Court and Court of Chancery and  
the Judge of Probate in order to enforce his  
decrees ag<sup>t</sup> the Ex<sup>r</sup>. & can issue an execution  
in the same manner as a Court of Chancery  
does for Contempt - the rest of the law is the  
same as in England in the Spiritual Courts.  
The Ecclesiastical penalties excepted

In N. York the Ex<sup>r</sup>. is liable for any injury  
done by the testator to another persons pro-  
perty whether his assets be thereby benefitted or  
not but when the ad<sup>r</sup>. or Ex<sup>r</sup>. sues in right of  
testator and fails he is not liable for Costs

Of the Law of Connecticut in this respect

As in England the real Estate depends to the  
heir and the personal to the Ex<sup>r</sup>. or Adm<sup>r</sup>.



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If then an injury be done to real property the heir  
only brings the action if to the personal the Ex.<sup>r</sup>  
brings the action and yet the title is defeasible  
in the event of the personal Estate falling short to  
pay the debts and wholly ~~and~~ defeasible in case of  
insolvency for the real property is in this State  
as much a fund for payment of debts as the personal  
at ~~any~~; but the personal is first to be exhausted  
in the payment of debts excepting certain neces-  
sary articles and what is by the Court of Probate  
given to the widow and are called the widows  
necessaries which are those ~~articles~~ articles ex-  
empt from Execution pointed out ~~to~~ by  
Statute — When the personal Estate is exhausted  
then the ~~real~~ Ex.<sup>r</sup> or Adm.<sup>r</sup> applies for an order  
from the Court of Probate to sell so much of the  
real Estate as will be sufficient to pay all the  
debts and when the money is raised it ~~as~~ is apportioned  
in the Ex.<sup>r</sup> or Adm.<sup>r</sup> hands — Whilst this is doing  
the heir is entitled to the possession of the real  
Estate for the possession must follow the Estate and

in the Event of the insolvency of the Estate  
 that ~~the~~ heir has to account for the profits to  
 Ex<sup>r</sup> - if we never had been acquainted with  
 the English System of Defuncts I see no reason  
 to conclude that the real Estate should any  
 more depend to the heir than the personal  
 - perhaps it may be a question whether the  
 heir as such can be sued in in this State as  
 the Ex<sup>r</sup> has the whole controul of the whole  
 Estate - I perceive no ground for it, as having  
 rec<sup>d</sup>. the assents upon the principle ~~and~~  
~~which~~ adopted in equity they may be per-  
 sued & It may also make a considerable question  
 in this ~~English~~ State whether a Mortgage shall  
 descend to the heir or Ex<sup>r</sup> - It has been the gen<sup>l</sup>.  
 practice for it to go to the heir but it is appre-  
 hended that the Ex<sup>r</sup> may claim it but to  
 recover it the heir must bring the suit &  
 pay the money over to the Ex<sup>r</sup>



In Connecticut when the personal Estate is suf.<sup>117.</sup>  
ficient to pay all the debts the adm<sup>r</sup>. or Ex<sup>r</sup>. must  
pay all when called upon after the time set them  
by the Court is expired - When the personal is  
insufficient to pay all the debts the adm<sup>r</sup>. or Ex<sup>r</sup>.  
may apply to the Court for an order to sell land  
to the amount of the sum of the debts that the  
personal Estate will not satisfy - and if the Court  
will not grant such an order when necessary  
they may be compelled by a Mandamus from  
Our Sup<sup>r</sup>. Court - Where both personal and real  
are insufficient the Ex<sup>r</sup>. & Ad<sup>r</sup>. ought to be ex  
tremely careful how they pay debts but it is  
apprehended that Ex<sup>r</sup>. or adm<sup>r</sup>. pays debts in m<sup>o</sup>.  
toto and afterward the Estate appears to be in  
solvent ~~it is apprehended~~ that the money may  
be recovered in an action for money had & recd.  
and that the Creditor cannot hold any more than  
his averageable part - upon the Personal and real  
<sup>being</sup> ~~and~~ insufficient the Ex<sup>r</sup>. represents to the Court

118. of Probate that he apprehends the Estate is insolvent - Commissioners are appointed to examine the claims and if a claim be rejected by them it is final if nothing more is done about it by the claimant who may resort to the Court of Probate and complain to the Court of the injury which he has sustained by their rejection and if the Court thinks the rejection to be well founded he will accept of the Com<sup>r</sup>'s Report but the party injured may appeal to the Sup<sup>r</sup> Court and shew why such report should not be accepted and if their report is accepted it is conclusive upon creditors unless the judg<sup>t</sup> of the Court is appealed from but not reviewable by the Ex<sup>r</sup>. for if sued he may litigate the demand without any appeal but not the creditor - Any judg<sup>t</sup> of the Court of Probate whose duty is judicially and not ministerially may be appealed from - When the Com<sup>r</sup>'s return that there is no insolvency there is an end of it: but if it is insolvent by their return the Adm<sup>r</sup> collects the debts and



when it becomes ascertained what assets are in <sup>119</sup>  
his hands an average is made and all the  
creditors receive an equal share except adm<sup>n</sup>.  
Charges - ~~Debts to the Govt~~ State taxes and  
debts for sickness have rank and are paid in  
full - ~~perhaps~~ perhaps the gen<sup>l</sup>. practice of the  
courts will establish the construction of the  
insolvent act to mean the last sickness only  
but it is apprehended that it truly means  
all sicknesses because it is a copy of the Stat  
of George 2<sup>d</sup>. where the word last is mentioned  
therefore it may be supposed that it was left  
out of our Statute designed by this construction  
is from analogy but the same must be  
given upon principle because if in any  
sickness except the last, the physician if  
he gets his patient well & loses in the event  
the greater part of his debt but if he dies gets  
all therefore to lay aside all temptations of  
the kind all sicknesses ought to be paid in full

In case there is not Estate sufficient to pay those debts which claim priority under the insolvent act it is apprehended the adm<sup>r</sup>. Charges ought to have the preference and indeed says M<sup>r</sup>. B. I have known 3 instances of the ~~the~~ kind happening and those charges were first paid. The Ex<sup>r</sup> or adm<sup>r</sup>. when sued by a Creditor cannot plead *plene administravit* unless there is no remainder after the afo<sup>r</sup> said debts are paid for if there is no insolvency there can be no room for such a plea for nothing excuses but payment in full - if there is insolvency nothing excuses but pleading <sup>of</sup> the doings in the Court - the average statute & payment of debts in such average - but when Legacies sue *plene administravit* is a proper plea as the case may be for there is no other system of average but what has been already noticed for the English Law of Legacies is our Law - When Creditors sue there is no room for the Pl<sup>t</sup>'s replication of *Quasi administravit* for if there is no



insolvency there is no want of it let him 121  
have wasted the Estate as he will for he must  
pay: if there is an insolvency and an aver-  
age plead this is conclusive unless appealed  
from for he will be obliged to answer before  
the Judge of Probate for every devastavit

~~Our Statute declares that when~~ In case of an  
average there appears to be no room for a lega-  
tee to plead a devastavit for the whole has been  
determined by a Court of competent jurisdic-  
tion but in case of no insolvency devastav-  
it is a proper replication for a Legatee.

Our Statute declares that where there is an  
insolvent Estate and Com<sup>r</sup> appointed if  
any person neglects to bring his claim  
he shall not be barred of recovery unless  
there is newly discovered <sup>Estate</sup> never before inven-  
toried the question then naturally arises how  
is this person to get at this Estate and his claim  
to be recovered for inst: & neglects to carry in his  
claim of £200 it afterwards turns out that the

the rest of the creditors get but 10s on the £1. but  
 after the average was made & discovered £200  
 property which was never inventoried now if  
 he takes the whole of this £200 which he has  
 discovered he gets the whole of his debt whereas  
 the other have gotten but half and in this  
 manner he takes advantage of his neglect  
 and this would lay great foundation for fraud  
 for a creditor knowing of Estate that is not  
 inventoried will not carry in his claim  
 and then after the average is made get the  
 whole of it notwithstanding the evident in-  
 congruance of this to the average law it was  
 and still is ~~not~~ practised as if there was  
 no other way to conduct the business but  
 it is apprehended the following is a remedy.  
 let the creditor who has thus neglected to  
 carry in his claim and who has discovered  
 new Estate report this new Estate to the Ex. or  
 Ad. and he inventory it then let this be



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debtor take out his averageable part as  
much on the pound as the other creditors  
did in fact stand on the same footing with  
them and if there is any thing left distri-  
bute it equally among all the creditors  
and if the Ex<sup>r</sup>. will not inventory it are the  
bond and proceed as in any case

### Of an Ex<sup>r</sup>. De son tort

The existence of such a Character as an Ex<sup>r</sup>. in his  
own wrong <sup>is</sup> very much questioned and the law  
as it now stands in Connecticut except in one  
particular case where it is absolutely necessary  
which will hereafter be mentioned.

If such a character exists, as such contingency is  
not provided for by our Law, viz, Statute, the  
proceedings must be as at common law &  
in such case the creditor who sues recovers his  
whole debt the insolvency of the testator not-  
withstanding - to admit of it unless where an  
absolute necessity exists is to defeat the most  
prominent features of our Law viz, an ave

124. rage among Creditors - In ordinary cases  
there can be no necessity for it because such a  
Character may be sued as a Trespasser and  
any creditor can become an administrator  
if he chooses - If the Estate be insolvent the Ex.  
de son tort can never after being sued recover  
back any part of that debt so recovered by  
the Creditor and of course that Creditor will  
get his whole debt while the others get only  
a part of theirs: then certainly there can  
or at least ought not to be an Ex. of this kind  
unless where necessity requires it which  
may happen when the true Ex. or Adm. cannot  
touch the assets as in case of a  
fraudulent conveyance for they cannot  
middle with such conveyances because the  
Courts have determined that such conveyances  
are good ag<sup>t</sup>. the grantor his heirs assigns  
& forever therefore in this case there must  
be an Ex. de son tort or none and of course -



quence no average Law can take first 123  
but we must be governed by the Com: Law  
upon the subject and he who comes first  
is served first

Of the liability of the heir for the co-  
venants of his ancestor &c

In this case there is a difference between  
our law and the English: for by theirs we  
have seen that the heir is bound by the co-  
venants of his ancestor such as bonds, obli-  
gations &c &c but in Connecticut it is appre-  
hended that the heir is bound by no person-  
al covenant of the ancestor whatever and  
he is not bound by his real covenants than  
any more than any assignee whatever -  
Inst: A by note promises B that he will  
pay him £10 on demand this being a per-  
sonal covenant - A agrees with B that for  
a certain sum he shall have the liberty of

digging a ditch in his Land and the privi-  
~~ledge~~ ledge of always keeping it open this  
 is what is called a real covenant and ac-  
 companies the real Estate viz, the Land:  
 Would the heir in this case be liable? He  
 would but in no other way than any other  
 vendee or assignee would be for if any per-  
 son had bought this Land & he would have  
 bought it under the incumbrance of that  
 privilege and the heir is exactly in the same  
 situation for if he stop it up he is liable  
 as would be the vendee. In this State  
 we have no ecclesiastical Courts and the  
 Court of Chancery has no power over legacies  
 and as the Court of ~~The~~ Probate has here  
 come in the place of the Ordinary one would  
 naturally suppose that he had the power  
 over legacies but it is not so. it is true indeed  
 he can order them to be paid & ~~but~~ but they



are to be recovered in a Court of Law only <sup>127</sup>  
when the Legatee states in his will that the  
testator died leaving him a legacy, that if  
Ex<sup>r</sup>. refuses to pay it he &c

### Of the Ex<sup>r</sup> or Adm<sup>r</sup>. paying Costs

In this State the Ex<sup>r</sup> or Adm<sup>r</sup>. must pay cost if  
he fails in any suit. In the distribution of  
personal property the Stat. of Car. 2 is the guide  
in Connecticut with this difference that brothers and  
sisters of the whole blood are preferred to all persons  
whatever even those in the first degree as well as  
those in the second and the heir of the whole blood  
every where is preferred to the  $\frac{1}{2}$  blood in the same  
degree — It is also observable that altho' brothers &  
sisters of the  $\frac{1}{2}$  blood yield to those of the first  
degree yet they have a preference to all in the  
second degree except those of the whole blood who  
as has been observed have precedence to the first  
degree. — Of proving the Will in Connect.  
The mode of proving the Will is here in some

measure different from the English mode which is as before mentioned, ~~was~~ done in two ways, viz the Common and the Solemn form - but in Connecticut the Court will never substantiate a Will upon the oath of the Ex<sup>r</sup> but always requires the oath of the witnesses. - The practice of the Courts of Probate of citing in the witnesses &c to prove the Will is not warranted by the Statute but only from general practice.

### Of a Caveat

If any person wishes to contest the propriety of a Will being accepted and proceeded upon, he may resort to the Court of Probate and there enter a caveat with the Court after which the Court issues a citation summoning those interested to appear and contest the Will &c &c on a certain day appointed by the Judge - if the Judge thinks after an impartial trial that <sup>the</sup> will is invalid the decedent intestate; but as before mentioned an appeal lies to Sup<sup>r</sup> Court.

Of a nuncupative Will in Connecticut  
That such Wills may exist in this State may be



questioned: however if ~~it~~ <sup>they</sup> they do <sup>are</sup> different 129  
from an English nuncupative Will for under  
their Law they <sup>are</sup> under certain restraints by the  
Statute of Car: 2. which has no binding in-  
fluence in Connecticut if therefore a man  
in this State can dispose of his property it  
~~must~~ by a nuncupative Will it must be under  
the rules of the Common Law of England but  
this ~~method~~ method of disposing of property is  
very much doubted since it has ~~been~~ been so uni-  
versal a practice to reduce Wills to writing -  
There is another difference ~~between~~ between the  
Eng: & Connect: laws respecting the compulsion  
of Ex: to make known whether they refuse or ac-  
cept, in a default of which under the former, Ex-  
communication was the punishment but  
under the latter £56. month after 30 days from  
the death of the testator ~

Of an infant Ex: under our Statute

Under the Connecticut Statute it is made a  
question whether an infant can be an Ex: or not:

30 However no ~~far~~ further than an opinion given  
no. 13. did upon the reason and spirit of the Stat: he may  
be an Ex: and from the Statute expressly declar-  
ing it. The contrary opinion as urged by many  
seems to <sup>be</sup> grounded on the reasons which are there  
- say they the Stat: permitting infants to be  
Ex: is virtually repealed by another statute  
which says an Ex: shall give bond and by  
~~statute and law~~ Law an infant cannot  
give bond therefore conclude that an in-  
fant cannot be an Ex: - but this seems rather  
too much strained to make it out but the true  
construction appears to be this - one Stat:  
has said positively that an infant may act  
as Ex: at 17 years of age - now after it has  
made him Ex: then is yet <sup>another</sup> Statute ob-  
- giv<sup>ing</sup> Ex: to give bond it is only making <sup>an</sup>  
infants bond good in this single case and  
which is an exception to the general rule -  
Out of this arises another important ques



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tion which may make a difference as to our  
Law and the English, that is, whether a deb-  
tor being made an Ex<sup>r</sup> discharges his debt  
or not? Altho' this be a discharge under the  
English Law yet there can be no reason why  
it should be the case in this State for the reason  
when you get into this Country ceases of course  
the Law ought to cease - In England as we have  
seen the Ex<sup>r</sup> receives nothing for his trouble  
and therefore it is reasonable to suppose that  
the testator intended to discharge him of his  
debt and give it to him for a compensation  
to execute his will; but in this State the Ex<sup>r</sup>  
is paid duly wages for the time he consumes  
in the settlement of <sup>the</sup> Estates of course there is  
no such reason exists as under the Eng<sup>ish</sup>  
Law - The Ex<sup>r</sup> under our Law is considered as a  
natural trustee and no objection can be made  
to him as a witness in a suit while in Eng?  
The Ex<sup>r</sup> cannot be a witness because he has

a beneficial interest under the Will being entitled to the residuum provided he has no legacy and provided he has a legacy there appears to be no reason to exclude him as a witness he having no interest in the event of the suit: true indeed he has to pay costs here, but as he and comes eventually from the Estate, admitting this doctrine to be true it may make a question whether a Debtor be made Ex. it would extinguish the debt.

A practice unauthorized by Statute seems to have crept into our Law and opposed to the Common Law that is the Court of Probate have assumed upon themselves a power of making a discretionary provision for the widow. This however happens only in cases where the Estate is solvent: for if it be insolvent it might occasion a dispute among the Creditors: but in other cases it seems perfectly just and those who claim a distributary share generally feel content.



supposing it equitable - This practice it is apprehended originated from the Statute directing the Court to take out of the Estate certain necessary articles not liable to Execution and distribute them to the widow - The Court considering the situation of the widow gives her such things of household furniture as he pleases. This practice having been long in use it is apprehended that the Court would continue it - yet if ~~such~~ such an allowance should be indirectly used the Court would undoubtedly check it -

Now by Statute

### Of Judgment Debts

In our Statute respecting the settlement of Estates there is a clause which says that all judgment debts are to be upon the same footing with other debts and not to be preferred in their payment - The gen. <sup>l</sup> opinion in this case is, apprehended to be, illy founded - For Inst: if a Creditor has attached the property of the debtor and before sale the debtor dies the

general rec<sup>d</sup>. opinion in such case is that the  
 creditor has lost his hold if the estate be insol-  
 vent and cannot hold his advantage in pre-  
 ference to other creditors - but it is apprehended  
 that this is wrongly founded: the creditor does  
 not lose his hold under these circumstances  
 for clear it is had not the debtor have died  
 he would not ~~lose~~ have lost his hold and since  
 the creditor by his legal diligence has obtained  
 a lien upon the property there seems to be no  
 reason why he should relinquish it any more  
 than if the debtor had lived since the law has  
 set apart so much of the debtors property as is  
 under attachment for the purpose of satisfy-  
 ing such attachment in fact the attachor by  
 such process invests himself with the property.  
 This compares with the case of an Execution  
 for where a person has once obtained jud.  
 and levied his execution his hold by debtors  
 death cannot be defeated besides it is not a



judg<sup>t</sup>. debt and the question is not between 135  
a judg<sup>t</sup>. Creditor and debtor but an attach-  
ing Creditor and the Debtor —

In England if judgment has been ob-  
tained you may proceed to levy the Execution  
but such a practice in this State would ~~defeat~~  
defeat the average law otherwise there could  
be no objection: for altho' the form of the  
execution be to take his goods &c and for want  
thereof to take his body yet if his body cannot  
be taken by means of death this can be no  
reason why the goods should not be taken:  
but if on the other hand money is to be p<sup>d</sup>.  
to the person and he be dead it may be paid  
to his Ex<sup>r</sup>. for his Ex<sup>r</sup>. represents him: This  
appears to be the English law upon the sub-  
ject and there can be no difference between  
that and ours upon this subject

### Of Distribution in Connecticut

Our Statute does not contemplate a descent  
of real property as in England has etc

The Courts may have treated it: and the heirs cannot obtain a severalty in the land by their own act unless affirmed by the Court of Probate and if the heirs are under age they cannot effect a settlement of it but the Court of Probate must absolutely distribute it — but when distributed among the heirs where there are not different claimants the judg<sup>t</sup>. of the Court of Probate is conclusive as to what each owns in severalty but if there be different claimants as Grand Father and Nephew and the Court distribute all the Estate to the Nephew when they ought to have given the Grand Father a part the judg<sup>t</sup>. of the Court is not conclusive and does not affect the title and it may be appealed from or the Grand father may bring his action of Quia in rem and the question of title is tried in the ordinary mode of proceeding

Granting an Adm<sup>r</sup>. or Ex<sup>r</sup>.

The body of the will is to be read & the



under the English or our law for the action  
 is not against him but against the proper  
 ty in his hands - The general rec<sup>d</sup>. opinion is  
 that property cannot be attached on a Scire fac:  
 but says Mr. Reeve "I see no reason why and  
 " ~~had~~ have done it several times in the course "  
 " of my practice and was never disputed " - "

There is a clause in our Statute which declares  
 that all claims not brought in by a limited  
 time shall be barred no recovery had. In  
 case the Estate be insolvent most clearly no-  
 thing can be recovered but it does not follow  
 that nothing should be recovered in case the  
 Estate be sufficient to pay all the debts -  
 I apprehend says Mr. Reeve the true con-  
 struction of the Statute to be thus - and says  
 you creditor shall not always have it in your  
 power to harass the Ex<sup>r</sup>. or Ad<sup>r</sup>. with claims

you shall produce your account within a limited time that the Ex<sup>r</sup>. or Adm<sup>r</sup>. may rid <sup>himself</sup> of the burden of the settlement of the Estate - The Statute speaking only of Ex<sup>r</sup>. and Adm<sup>r</sup>. meant only to bar claims against them after the time limited and not that the Statute should stop in and defeat that equitable principle pursue the assets where you can find them - but still if there is property to be found the creditor shall not be defeated tho' he shall not pursue a remedy ag<sup>t</sup>. the Ex<sup>r</sup>. yet he may take the property where he can find it

Wm

Feb<sup>y</sup>. 24, 1799

Wm



The English and Connecticut Law relative to  
the Estates of deceased persons — Compared

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English Law

Connecticut Law

The Real Estate descends to the heir over which the Ex<sup>r</sup>. has no controul unless empowered by the will and is assets in his hands to pay specially creditors

The real Estate depends to the heir, but is at the controul of the Ex<sup>r</sup>. in all or part if necessary for the payment of debts after the personal Estate is exhausted for that purpose and is not assets in the hands of the heir as such for the payment of debts.

who may if they elect come upon him, <sup>to the extent</sup> of assets received from the ancestor and judgt. is rendered ag<sup>t</sup>. him of the lands & in his hands if he has aliened then judgt. is ag<sup>t</sup>. him to the value, and the Devisee is in the same plight as heir, in case there are no specially debts the heir & receives the real property without being liable to pay any debts altho' the personal Estate should fall short of paying the Debts

2<sup>d</sup> If the specially credi<sup>tors</sup> & tho' the real Estate is at

140 Eng.

Connect.

Tors should elect to come the ~~—~~ continued of the Ex.  
 agt. the Ex. as they may } before it is used, the person  
 and by that means } at is to be exhausted and then  
 exhaust the personal } the Ex. may apply to the  
 Estate and leave none } Court of Probate for an order  
 to pay any or all the } to sell lands which order it  
 simple contract cre- } the duty of the Court to give  
 ditors then such cre- } and the avails of the land sold  
 ditors may in Chan- } are equally liable to the pay-  
 cery come agt. the hir } ment of any debt as well  
 to the extent of the spe } simple contract as other  
 cially debts which mi- } debts

ght have been collu-  
 ted of him and such monies being equitable af-  
 sets are to be divided among such creditors pari  
 passu - When the personal Estate has been ex-  
 hausted by specialty creditors a Legatee may  
 come agt. the hir as well as creditors but not  
 against the Devisee

3. That species of personal } In Connecticut as  
 property or Estate called } the real as well as  
 paraphernalia altho' } personal Estate is  
 not devisable but will not } the husband



Eng:

Connect

as the personal Estate of  
the deceased to satisfy —  
creditors that is so much  
of it as is over and above  
deceit — and necessary ap-  
proprated, yet it is not to  
be meddled with, untill the  
rest of the personal Estate is  
spent, and in such case if  
it is taken and there were  
specially creditors who ex-  
hausted the personal fund  
the widow shall, as ag.  
the heir, in Chancery  
stand in their place —

for the payment of  
debts I apprehend  
both are to be exhaus-  
ted before paraphernalia  
are to be exhausted  
muddled with, in ad-  
dition to this where  
the Estate is insolvent  
certain articles of per-  
sonal Estate are to be  
given to the widow  
such as by the law of  
this State are not lia-  
ble to be taken in Ex-  
ecution; and where  
the Estate is solvent but  
no personal Estate or

very little remains after payment of Debts: there  
has a practice obtained of giving a certain part  
or portion to the widow for her own proper-  
ty at the discretion of the Judge of Probate —

4<sup>th</sup> Voluntary creditors  
are to be <sup>proportioned</sup> ~~proportioned~~ to all

I know of nothing  
that contradicts this

Eng:

Consett

Others and to be prepared } this idea in our  
to Legatees } Law

<sup>th</sup>  
5<sup>th</sup> Any person of sane { The same Law except  
memory having pro { in this State the age  
-perty who is of sufficient { is seventeen  
age may make a Will of personal property  
and who are of the age of — some say 14 and  
some 17. Some courts are not an exception  
for where they have separate property their  
devise is good so is their devise of Chose in acti-  
-on for untill it be reduced to possession by her  
husband it is her property — So is her devise of  
what she has as Executrix in another Suit — The  
blind and unlettered are not an exception  
but their will must be read to them — neither  
are the deaf and dumb provided that it is proved  
from those who understand by signs that it  
was their desire to make a Will and that they  
knew what they meant



Eng:

Connect

143

6<sup>th</sup> " Almost any person { The same Law only  
may be an Ex. unless { excommunication is  
he is insane or has { not here an objection  
been excommunicated by the Spiritual Court,  
minority is no objection altho' such Ex. can  
not act as such untill the age of 17 years of  
age and in the meantime an Administra-  
tion is to be committed durante minoritate

7<sup>th</sup> " The infant Ex. acts as { Same Law  
such at 17 and his acts are  
binding upon himself and thus yet if  
he should release a debt or do any other thing  
which would work a devastat altho' such  
shall bind an adult Ex. yet shall the infant  
have his privilege and may rescind such  
act

8<sup>th</sup> " Ex. cannot be com- { By a Statute of  
pelled to give bonds for { this State an Ex.  
the faithful performance { must give bond.  
of the trust in the Suii

Eng: Connect  
 tual Courts yet where { Vide ante  
 an Ex. is in failing circumstances them-  
 very will compell him to give bonds

9<sup>th</sup> Administration is to be { Idem  
 granted to the next of kin or widow that is  
 to say to either and if ~~any~~ many are in  
 the same degree of kindred it may be granted  
 to all or one at the discretion of the Judge

10<sup>th</sup> In computing who is { Idem  
 next of kin the Civil law is to be observed.

11<sup>th</sup> If the next of kin is { Idem  
 under 21 years adm.<sup>n</sup> must be committed to  
 some other person durante minoritate and  
 in this case no respect is had to the next of  
 kin

12<sup>th</sup> No person can be made { Idem  
 an adm.<sup>n</sup> untill he be 21 years of age



Eng:

Connect

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<sup>th</sup> 13. An adm. is obliged } Idem  
to give Bonds for the performance of  
his trust —

<sup>th</sup> 14. Where there is an Ex. } Idem  
who dies without a Will his adm. is not  
adm. of the testators goods not adminis-  
tered but administration de bonis non  
is committed to some person and here  
no regard is paid to the next of kin  
neither would there be if adm. died with-  
out completing the business

<sup>th</sup> 15. It is the duty of the Ex. } If he neglects his duty  
either to refuse or take } in this respect he is liable  
upon himself the trust. } to be fined £5- per month  
if he neglects to do either he may be summoned  
and if he does not appear before the spiritual  
Court when this business is done he is to be excom-  
municated —

In Eng:

Connect!

16<sup>th</sup> If the named Ex<sup>r</sup> does any Idem  
act as Ex<sup>r</sup> before proof of the Will he is bound to  
act that is he is liable to all the burdens of  
an Ex<sup>r</sup> whether he proves the Will or not but  
can never bring a suit without proving the  
Will

17<sup>th</sup> There are two or more { Suits are here brot  
Ex<sup>rs</sup> one refuses yet may { by the Ex<sup>r</sup> who accepts  
be in the life time of his { only and suits are  
fellow Ex<sup>r</sup> act as such & { brot agt him only

all suits are to be brought in the name of  
all but suits are to be brought only agt the  
Ex<sup>r</sup> who proved the Will unless the other acts  
as such

18<sup>th</sup> The Ex<sup>r</sup> who accepts { Idem  
dies and appoints an Ex<sup>r</sup> the last is Ex<sup>r</sup> of  
the first testator altho' the other Ex<sup>r</sup> whose  
fund is living

19<sup>th</sup> He did not appoint an Ex<sup>r</sup> { Idem  
and the business is unfinished - admini



Eng: Connecticut  
stitution de bonis non is { Vide ante  
to be granted for the refusing Ex<sup>r</sup>. cannot act  
after the death of his fellow ~

20<sup>th</sup> The Ex<sup>r</sup>. is the owner { The Ex<sup>r</sup>. is not entitled  
of the residuum after { to the residuum in  
debts and Legacies are { any case ~  
paid unless there is a legacy given him by  
the testator in that case unless the legacy  
is of some triffl or to get a suit of mourning  
a ring and the like - The Ex<sup>r</sup>. is not entitled  
to the residuum but is trustee to the next of  
kin and must distribute the Estate acor-  
ding to the Stat: of distributions ~

21<sup>st</sup> The Court will let { From the last case  
in parol testimony to { it is plain that we  
shew that it was the { can have no just  
intention of the testator that the Ex<sup>r</sup>. should  
have the residuum altho there was a legacy  
22<sup>d</sup> The Court will not let { As in the last case  
in parol testimony { ~ ~ ~

to prove that the testator intended that the Ex<sup>r</sup> should not have the residuum when he left no legacy —

23. A Debtor is Ex<sup>r</sup>. The debt is apportioned both for creditors and legatees but where they are paid the debt the debt is discharged —

If this depends upon the idea as I apprehend it does that the Ex<sup>r</sup> is entitled to the residuum after debts and legacies are paid. ~~I agree~~ This doctrine may be very disputable and is very doubtful here —

24. Ex<sup>r</sup>. and Adm<sup>r</sup>. duty is to pay debts in the first place and in doing this they pay debts in the following order. Debts to the Crown — Debts provided for by a certain Statute — Judgment debts — Specialty debts &

There is no other rank in debts with us only public debts and debts contracted for ~~such~~ sickness are to be paid in the first place and the usual understanding is that



Engl:

Connect

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Lastly simple Contract  
and if he should pay any  
debts of inferior rank  
leaving a superior debt  
not paid and assets fail  
him he must lose it

Sickness means  
last sickness but  
as there is no such  
term as last men-  
tioned in the Stat.  
and no determina-  
tion on that point  
it must be considered

as *sub judice lis est*

<sup>25</sup>  
In the payment of  
debts of equal rank he  
may elect to pay which  
he pleases tho' it exhaust  
all the assets and leaves  
nothing for the other credi-  
tors unless a priority is  
gained by suit if so that  
must be attended to

Where assets fail to  
pay all the debts af-  
ter the death of tes-  
tator no priority can  
be gained nor is it at  
the election no prio-  
rity can be gained nor  
is it at the election  
of the Ex<sup>r</sup> &c but all  
the creditors of every  
description must have

their share by a strict average

<sup>th</sup> 26<sup>th</sup> The Ex<sup>r</sup>. having paid out the whole Estate and observed the priority of debts mentioned may plead plene administravit

{ Plene administravit is no plea in his State if there is any surplus after paying State debts and last vic-

reg debts. for if solvent he has enough to pay all if insolvent every one is entitled to his averageable part and nothing excuses but the payment of that average

<sup>th</sup> 27<sup>th</sup> If the Ex<sup>r</sup>. wastes the Estate or is so negligent of it that it is lost up - on pleading administra - vit the Pl<sup>ty</sup> may reply a devastavit and if that is found: Judg<sup>t</sup>. is rendered ag<sup>t</sup> the Ex<sup>r</sup>. de bonis propriis

{ There is no such replication as devastavit if the Estate is solvent the creditor stands in no need of it, if insolvent the creditor is entitled on suit to the average only: And in ma-

making the average the devastavit if any



Eng:

Connect

Vide ante { was considered: or if it  
appears afterwards the  
Auditor must resort to the Bond given for  
due performance of his trust.

20. An Ex. & son { Such a character if ad-  
mitted will defeat the  
average law for if any  
recovery is to be had it  
must be altho the Estate  
is insolvent upon the  
principles of the Common  
Law for no provision is  
made in our Statute re-  
specting it. When indeed  
the admr. has nothing to  
do with the Estate as in a  
case by of a fraudulent con-  
veyance by the decd. no  
injury is done by supposing  
such a character may exist  
De son tort -

and liable to creditors } Vide ante  
 to the extent of assets received and no further  
 if he pleads a false plea as that he now was  
 Ex<sup>r</sup>. he is liable to the extent of the Pl<sup>ty</sup> claim  
 but his having paid out the assets goes on  
 in mitigation of damages when sued by  
 him who is appointed Ex<sup>r</sup>. or Adm<sup>r</sup>.

<sup>th</sup>  
 2<sup>d</sup> The Bond given by the ad-  
 ministrator is not for the pur-  
 pose of subjecting the Bonds-  
 man in an action if the  
 adm<sup>r</sup>. does not pay the debt  
 for this he has <sup>his</sup> action  
 ag<sup>t</sup>. the adm<sup>r</sup>. but if the ad-  
 m<sup>r</sup>. conducts by not inventory-  
 ing the Estate as enables him  
 to defeat the creditor by plea-  
 ding solene administration  
 or makes up false accounts  
 and procures the allowance

By the ~~Law~~ Laws of  
 Connecticut the Ex<sup>r</sup>. also  
 gives bond and as the  
 bondsman is liable if  
 the adm<sup>r</sup>. does not dis-  
 tribute the distributary  
 shares - so I apprehend  
 the Bondsman where  
 there is an ~~Ex<sup>r</sup>~~ <sup>Ex<sup>r</sup></sup>  
 why it  
 has been supposed, to  
 be liable if he did not  
 pay over a legacy but  
 is there not a dis-  
 tinction if the Ex<sup>r</sup>.



Eng:

Committee

15<sup>th</sup>

If it, or if he does not distribute the shares amongst the next of kin then is the bondsmen liable

assents to the legacy he enables the legatee to recover and if he does why should the bondsmen be liable more than when he does not

pay a debt, if he does not assent there can be no question but what the bondsmen is liable.

30<sup>th</sup> A Co. Ex<sup>r</sup> is not liable to creditors for the devastant of his companion unless he has committed the care of the property to him or signed some writing acknowledging a receipt of the property wasted and altho' he did not waste it for the other actually took it yet it is conclusive evidence against

As the W<sup>th</sup> Creditor can never reply a devastant and is bound to recover the average in making out of which the devastant is considered: It will be impossible for a Co-Executor to avail himself of this principle but must ~~never~~ even totally suffer for the devastant of his companion

Eng:

Commons

him that the property { *Vide ante*  
came to his hands

31<sup>st</sup> If an Executor is sued  
for a legacy he may plead } Same plea here  
plene Administravit } is proper

32<sup>nd</sup> If a Legatee sues and Ex<sup>r</sup>  
pleads plene Administravit } Here the same  
the legatee may reply a } application is  
devastavit } proper

33<sup>rd</sup> A Legatee sues for  
his legacy either in { We have no spiritual Court  
the ~~spiritual~~ spiritual } but in lieu thereof we have  
Courts or Chancery un } Courts of probate but a le-  
less it is a legacy char } gatee neither sues in Chan-  
ged upon land in that } cery or in the Court of pro-  
bate for his legacy but in  
case the suit must be } the Common Law Courts  
in Chancery - An Ex<sup>r</sup> }  
may be sued even in a Common law Court where  
he has promised to pay the legacy upon such pro



Eng.

Committ.

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mise and if he has it in his hands such promise is not within the Statute of Fraud &c.

34<sup>th</sup> In the payment of Legacies the Ex<sup>r</sup> is to pay the specific legacies in the first place and if the assets said so that part of the specific legacies cannot be paid yet there shall be no abatement <sup>by</sup> any such legacies - It seems in such case to be too much in the power of the Ex<sup>r</sup> to favour one legatee at the expence of another

Note here M<sup>r</sup> B. said the rule was not as extensive as above laid down and s<sup>d</sup> there were instances where the specific legacies did abate

35<sup>th</sup> On a ~~failure~~ failure of assets to pay all the legacies - specific legacies are to be first paid

36<sup>th</sup> On ~~the~~ failure of Assets to { The same  
pay all the pecuniary Legacies they must abate  
in proportion among themselves

37<sup>th</sup> Where the whole Estate is { The same  
given out in specific legacies  
and then a pecuniary legacy given out of the Estate  
it is first to be paid and a charge upon the specific  
Legacies

38<sup>th</sup> A specific legacy if lost or { Idem  
destroyed - it is lost to the legatee

39<sup>th</sup> The legacies are paid before { Under our Statute  
a debt the creditor ~~may~~ must resort  
to the Ex<sup>r</sup>. - he to the legatee if  
he has taken security of the lega-  
tee to refund, if he has taken  
no security he loses the debt:  
but why should not such pay-  
ment <sup>be</sup> considered as a payment { the Ex<sup>r</sup>. is not in dan-  
ger of being surp-  
sed with debts for  
unless the debts are  
bro<sup>ut</sup> in by a certain  
time allowed by the  
Court of Probate they  
are not recoverable



Eng:

Connect

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by mistake and irrecoverable } Vide ante  
back

40<sup>th</sup> In the event of a  
Creditor's not being p<sup>d</sup>.  
and the legatee having  
received their legacies and  
the Ex<sup>r</sup> being unable to  
pay the Creditors: the  
Creditors may come ag<sup>t</sup>.  
the legatee } If he has not ex-  
hibited his debt with  
in the time limited  
altho' he cannot sue  
the Ex<sup>r</sup>: - Cannot he  
come against the  
Legatee who has recd.  
his legacy

41<sup>st</sup>. As a simple contract  
Creditor in Chancery shall  
come ag<sup>t</sup>. the heir or devisee } Our system precludes  
any such law  
in the place of specially Creditors when they have ex-  
hausted the personally to the extent of such specially  
so shall a legatee have a like advantage ag<sup>t</sup>. the  
heir but not the devisee

42<sup>d</sup>. When a legatee dies in } Same Law  
the life time of the testator such legacy is lapsed

Eng:

Commette

and sinks into the residuum } Vide ante  
 but if given over in the event of such legatee's  
 dying it is taken by the second the legatee.

43. When a legacy is given } Same Law  
 to a legatee at such an age and the legatee dies  
 before that age it is lapsed and sinks into the  
 residuum unless given over.

44<sup>th</sup> If a legacy is given } Same Law  
 to a legatee at such an age to the legatee it is vested  
 and transmissible to such legatee's representa-  
 tives unless given over upon the death of such  
 legatee.

45<sup>th</sup> When a legacy is given } Dem  
 over to one legatee and in case of his death  
 given to another it is construed to mean  
 payable to the second legatee in case the first  
 dies before marriage or 21 years of age.



46<sup>th</sup> When a legacy is given { *idem*  
payable at such an age char-  
ged upon the land and the legatee dies before  
that time — it is lapsed in favour of the  
heir

47<sup>th</sup> A legacy is given by a { *idem*  
parent to a child payable  
at such time and no provision for the main-  
tenance of such child in the mean time it is  
upon interest if given by any other person  
it is not on interest

48<sup>th</sup> A legacy is given to a le- { *idem*  
gatee payable presently: such  
legacy after a year is lapsed is upon interest  
if the legatee is a minor: if an adult it is on  
interest after a demand of the legacy

49<sup>th</sup> A legacy is given pay { *idem*  
able at a future time or presently whether by

Enry:                      Connect  
a parent or another, to annu. } Vide ante  
nor or adult and payable }  
out of that which yields an annual profit  
it is on interest without a demand

50<sup>th</sup> To determine whether } When  
a testator has in his life time adcerned a legacy  
we must find that the testator had animus  
adcernendi for should he alien the legacy or pledge  
it out of necessity to raise a sum of money  
this is no evidence of such intention and the  
legatee shall be allowed it agt. the Ex. if there  
are assets. If no such necessity could be sup-  
posed to exist it is to be attributed to nothing  
but an intention of the testator to adcern it  
So if the legacy was a bond and ~~and~~ this was  
voluntarily paid by the obligor no such inten-  
tion is apparent or if paid by compulsion  
if it was to screen the debt from being lost,  
or his necessity for cash occasioned it there is  
no such intention apparent



English —

Connecticut

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51<sup>st</sup> A Legacy of all my person { Same Law  
at ~~Estate~~ property will include  
all such property whether gained after making the  
Will or before —

52<sup>nd</sup> So a legacy of all the testators { Idem  
money goods &c at such a place pass  
as what was there at his death —

53<sup>rd</sup> A devise of all the testators { Same Law  
land does not pass after purchased land unless  
there has been a republication of the Will —

54<sup>th</sup> Even a republication of the Will will not  
pass real property purchased after { Idem  
making the Will that does not fall  
within the description of the words in the Will  
which is supposed to speak from the repub  
lication —

55<sup>th</sup> A legacy is given to the children { Idem  
of J. S. at the time of making the Will J. S. had  
children and other children were born to J. S.

Eng:

Connect

afterwards - the afterborn children { Vide ante  
shall not take unless the Will was republished: in  
that case the children living at the time of re-  
publication will take

56<sup>th</sup> If J. S. had no children at { Idem  
the time of making the Will all the after born  
children of J. S. shall take

57<sup>th</sup> A legacy is given to the chil- { Same  
dren of J. S. and J. N. neither of  
whom at the time of making the Will had  
any children but afterwards they both have  
children but their numbers are unequal  
such children take per Capita

58<sup>th</sup> A legacy is given to J. S. { Same law  
children and J. S. had no children  
at the time of making the Will or afterwards  
but the time of making the Will J. S. had  
Grand children such Grand children shall take  
but not if J. S. had had a single Child



Eng:

Connect<sup>t</sup>

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59<sup>th</sup> A legacy given to be divested or { Same Law  
forfeited if the legatee marry such restraint is idle  
and the legacy good —

60<sup>th</sup> The testator may charge a legacy with a condition { Same  
that the legatee shall not marry a certain person or at a  
certain place or before a certain age in that  
case the age pointed out must be reasonable  
this indulgence has been carried so far as to be  
good where the legatee was restrained from ~~marry~~  
marrying a papist — such general descriptions  
as that of any denomination is idle —

61<sup>st</sup> A legacy left by a husband to his { Same Law  
widow upon condition that she does not marry,  
the condition is good —

62<sup>nd</sup> A Legacy given upon condition { Same Law  
on that the legatee marry with the consent of  
some certain person the condition is only

Eng:

Connect<sup>t</sup>

in *terrorem* unless <sup>in</sup> the event of { *Vide ante*  
such legatee's marriage without consent the  
legacy is given over in such case the first na-  
med legatee loses his legacy —

63<sup>d</sup> When there is a marriage port<sup>n</sup> { Same Law  
tion secured by articles or covenant and the  
covenantor leaves a legacy to the person entit-  
led if it be equal or greater than the portion  
it is a performance of the covenant; if it is  
less it is a performance *pro tanto* —

64<sup>th</sup> When a testator owes { No such rule was  
a debt and leaves a legacy } obtained in this  
to the Debtee equal or greater State of Connect<sup>t</sup>  
than the debt — The old rule was that the legacy  
when received was a satisfaction of such debt  
which rule was gradually impaired by requiring  
that such legacy and debt should be *ejusdem*  
*generis* and then that it should be payable  
at the same time and afterwards it was *requirunt*



Engle

Conmuth

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required that there should be no { *Vide nota*  
 general clause in the Will direct-  
 ing all debts to be paid to make the legacy  
 a satisfaction - and that a legacy to a  
 bastard child was never within the rule it  
 was then supposed there ought to be some ex-  
 pressions in the Will indicative of the testators  
 intention that the legacy should be in satisfac-  
 tion - and at length it was determined that  
 it must be expressed in the Will that it was  
 in satisfaction of the debt to make it so which  
 resolution reestablished the dominion of  
 Common Sense after she had been de-  
 throned for more than a Century

<sup>th</sup>  
 65 - *Where a legacy is given in* { *Same Same*  
*a Will and repeated in totidem verbis it is*  
*but one legacy - but if given in different*  
*instruments - as in the body of the Will and*

Eng<sup>l</sup>

Connect

then in the Codicil or any other writing such legacies are accumulative { vide ante

<sup>th</sup>  
C6<sup>n</sup> The Legatee's right to the Legacy itself depends upon the Ex<sup>or</sup> assent that he should have it. so that in case the legacy is specific there is no doubt but the Ex<sup>or</sup> may use that legacy in the pay ment of debts altho there are assets without it and in such case it is out of the power of the Legatee to sustain any action ag<sup>t</sup> the Ex<sup>or</sup> that presupposes property in the Legatee; yet he may recover of the Ex<sup>or</sup> the value of such legacy upon the ground that there are assets

C7<sup>th</sup> Upon the death of an intestate after the pay ment of debts the personal estate is to be distributed { The personal and real are under the control and ~~sub~~ subject to a Statute of distribution in this State



Eng:

Connect

161

according to the Statute of { *Vide ante*  
distribution of Cas: 2.

68<sup>th</sup> The distributary share { *Same Law*  
under the Stat: vests in the person entitled  
to it on the death of the ~~intestate~~ intestate  
and altho' such person dies before distribu-  
tion is made yet such share is transmissi-  
ble and goes to his Ex.

69<sup>th</sup> The Stat: of Cas: gives one { *Same*  
moiety of such residue of the personal  
Estate to the wife in case there are no children  
or their legal representatives and if there  
are then one third

70<sup>th</sup> The Stat: of Cas: { Our Stat: gives the whole  
then gives the other  $\frac{2}{3}$  of { of the real Estate with  
of the personal Estate to such { the incumbrance of  
children or their legal { dower and  $\frac{2}{3}$  of the  
representatives { personal Estate to such  
children and representatives

Eng:

Connect

71. In case there are no children the Statute of Car: distributes the personal estate to the next of kin and their legal representatives

{ Our Statute differs from the English that it distributes real as well as personal property and in the distribution of it real property,

distributes such as came from some ancestor or hindered by descent devise or deed of gift, to the intestates brothers &c and their legal representatives of the blood of such ancestor and for want of such, to the next of kin to the intestate of the blood of such ancestor - and the rest of the real estate as well as personal is given to brothers &c in preference to the next of kin and also to brothers &c of the 1/2 blood who are expressly preferred to all others in the same degree

72. Kindred are computed by the civil Law { Idem

73. By the Stat: of Car: representation is continued ad infinitum in the descending line { Idem



but not admitted among collaterals } Vide ante  
after brothers and sisters Children

74<sup>th</sup> A. brothers Children are in } Same Law  
the 3<sup>d</sup> degree. so among all Children in the same  
degree there is no representation

75<sup>th</sup> The Stat. of James 2<sup>d</sup> } We have no such Stat.  
places the mother upon the } but ours prefers bro  
footing of brothers and sisters } their and Sisters of the  
whole blood as it respects the personal and real if the  
last did not come by descent gift or devise

76<sup>th</sup> It seems by the con- } We have no such Stat.  
struction given to the Stat. } and of consequence no  
of James that the mother is } such construction  
considered as making part of the same stock with  
the brothers and sisters. - so that if they are all dead  
leaving children, yet such children the mother living  
can take by representation

Eng:

Connect.

77. Children advanced in the life time of the father by him they cannot take any part of his estate unless they will bring the advanced portion into hotch potch —

Advanced children do not bring their portions into hotch potch but keep what they have and receive enough from their father's estate to make the equal —

78. No advancement by any other relative makes it necessary to bring into hotch potch —

Same Law

79. Money bestowed on an education or given for expences in travelling amusements &c is not an advancement

I know of no decision in this State upon this subject —

80. Under the Stat of Car the  $\frac{1}{2}$  blood is equally entitled with the whole blood

So far as it respects common real Estate the  $\frac{1}{2}$  blood claimants are equally entitled with the whole

but as to other Estate the whole in the same degree is preferred



Eng:

Connect.

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1<sup>st</sup> By the Stat: of Cur: 2<sup>d</sup> The husband is entitled to be adm<sup>r</sup> on his wife's Estate which may consist in Choses in action and retain them without distributing them to the next of kin to the wife. This doctrine was not known to the Com. Law the husband had not a right to the dec. wife's personal Estate in action

Had it not been for the supplementary Stat: of Cur: giving the husband the representation, the choses in action of the wife under the 1<sup>st</sup> Stat: the next of kin to the wife would have been entitled to the Estate as we have no such Stat: supplementary Stat: in this State the next of kin and not the husband is entitled to the Estate

but such Estate vested in her adm<sup>r</sup>. liable to the same rules of distribution as his Estate would be had he died intestate - It was not a marital right of his at Com: Law to claim her Choses in action unless he reduced them to possession in his life time but on the contrary she might dispose of them by Will the coverture notwithstanding but as the husb<sup>d</sup> was considered under the Stat: of Hen: 8<sup>th</sup>



Eng:

Connect!

to be the rightful adm<sup>r</sup>. of { his wife and as such had as  
all other adm<sup>r</sup>s. had before the Stat. of Car: the  
whole Estate to himself not by virtue of any law  
but because the right <sup>of the</sup> true owners was with-  
out remedy until the Stat. of Car: gave one: and  
whilst this Stat. prevented other adm<sup>r</sup>s. from tak-  
ing the whole Estate it expressly gave that to  
the husband as a matter of right which he had  
been accustomed to take by wrong

Q2: Brothers and sisters { Our Stat. expressly pre-  
fers them in the same degree { fers brothers &  
with grandfathers and  
grand mothers are preferred to them by the adju-  
dications of the Eng: Courts

Q3: I find no decision pre-  
ferring G. father &c to nephews  
and nieces - the principles  
of the former case lead us to  
suppose that such preference  
would be given —

I can conceive of no rea-  
son why such preference  
should be given: It ap-  
pears to contradict the  
express provisions of  
the Statute



Q4<sup>th</sup> When real property is left by Will to an Ex<sup>r</sup> with power to sell the same and it is sold the assets are legal } Our Stat. enables the Ex<sup>r</sup> by the aid of the Court of Probate to sell all the real Estate if necessary for the pay<sup>t</sup> of debts —

Q5<sup>th</sup> Where an Estate is given to Trustees to sell and raise money for the payment of debts the trustees are compellable in Chancery to sell and the assets thus raised are equitable assets —

Q6<sup>th</sup> An equity of redemption is not assets at law in the hands of the heir and as it is not real Estate the Ex<sup>r</sup> has nothing to do with it —

Q7<sup>th</sup> An Estate pur autre vie where the life is by the Stat<sup>ut</sup> of Mar<sup>riage</sup> made assets in the } We have no Stat<sup>ut</sup> upon the subject and if the Com<sup>mon</sup> Law doctrine takes place such Estate is open to the first occupant —

Eng: b.

Connect.

Vide ante } can bring a suit on the contract  
made by the testator would defeat the average  
law - or introduce principles & into our law  
never before heard of - For the Court to under-  
judg<sup>t</sup>. for the whole sum would enable him to  
recover more than the other creditors to which  
he has no right - for the Court to under j<sup>st</sup>.  
for an average sum is out of their power:  
the law has made no provision for such judg<sup>t</sup>.  
but admitting this to be in the power of the C<sup>t</sup>.  
yet in the case of a surplus of new discovered  
Estate more than such judg<sup>t</sup>. - there seems no  
provision to be made in such case by which  
the creditors can get at it and certainly they  
are entitled to it and the Ex<sup>r</sup>. ought not to  
retain it - Upon the plan proposed in this  
opinion the average law is preserved entire  
and complete and effectual justice is un-

¶  
Pg<sup>th</sup>. No provision is made } The Stat. of the  
for pay<sup>t</sup>. of debts payable } State of Connect<sup>d</sup>



Eng:

Connect<sup>t</sup>

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Vide ante } provides that all debts when  
the Estate is insolvent shall  
be paid pari passu and judg<sup>t</sup> debts shall have  
no preference to others. Whether this provi-  
sion affects debts where by using legal diligence  
a priority has been obtained by attaching in  
the life time of the deceased is a question; I should  
suppose that it ought not; for by attaching  
the property the creditor had acquired a right to  
have the property so attached holden for the  
purpose of responding the judg<sup>t</sup> that  
might be obtained ag<sup>t</sup> him, and I cannot con-  
ceive upon what ground it can be that the  
death of the debtor should divest that right &  
leave him to cost without any benefit from  
it.

90<sup>th</sup> Certain actions to which the testator or  
intestate are entitled to in their life time  
die with them and his Ex<sup>r</sup>. & cannot bring  
We have no such Stat.  
but it has been as an  
tinent as the time of Ed: 4.  
and has always been  
understood to be the law  
in this country

English Law - Connecticut  
wrongs done to the person or vis a vis  
personal property died with  
them as a battery to his person or taking  
away his personal property - but by a Stat.  
a remedy is given when the personal pro-  
perty is taken away and the Courts have  
adjudged that all injuries done to the personal  
property of the testator tho' it is not a taking  
away but a destruction of it falls within the  
equity of the Stat. so that the rule seems to  
be that where the assets of the testator has not  
been injured by the wrong there is no remedy  
but where they have there is

91<sup>st</sup> In certain actions the Ex<sup>r</sup> is not liable where the testator ~~he~~ would have been for an injury done to the person by the testator, the Ex<sup>r</sup> is not liable, and for an injury done to property by the testator he is not liable in any action unless the testator would have been more equitable that the Ex<sup>r</sup> should be liable where the tort injured the Pl<sup>ty</sup> property.



Eng:

Connect

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testors assets have been bene { Vide ante  
fide - It is not enough that the Pl<sup>d</sup> Estate has  
been injured

92<sup>d</sup> When the Pl<sup>d</sup> property { The same Law  
has been injured by the tes {  
tator accompanied with a benefit to the testa  
tors assets, an action lies ag<sup>t</sup> the Ex<sup>r</sup> as trover  
by the testator &c - yet such action must not  
be in the form of an action adopted to a Tort  
but to a contract - upon the presumption that  
the property so taken has been converted  
into money which the Law presumes he  
promises to pay - even in some contracts  
if the nature of such contract is such that the  
assets of the testator could have rec<sup>d</sup> no benefit  
from it the action dies - as where a man  
undertakes to perform gratis the testator would  
be liable upon such contract for damage done  
thro' negligence but the Ex<sup>r</sup> would not be  
liable and where he has to have a reward

Eng:

Connect!

which depends entirely upon { Vide ante  
doing the act and it is thro' negligence omit-  
ted the Ex<sup>r</sup> is not liable - as if an officer un-  
der takes to execute a writ of Execution - his  
fees depend upon the Execution - this he  
omits to do and thro' his negligence an  
injury is sustained in such case he is liable  
but not his Ex<sup>r</sup>.

Wm



# A miscellaneous Lecture on Law relative to the acquisition of property

## Of animals *ferae naturae*

A difference exists both in England and Con-  
tinental between that kind of property which  
a person may have in these kind of animals  
and that which he may have in other things.

The property which a person has in animals  
*ferae naturae* such as deer rabbits dogs cats &c  
is said to be a qualified property and not an  
absolute one - This property is commensurate  
with actual possession and when that is  
lost the property of the original owner is lost.  
What shall be construed a losing an actual  
possession may make some enquiry. If an  
animal *ferae naturae* be driven away by  
some other person the owner does not lose  
his actual possession but in order to lose it the  
animal must be taken by his owner voluntarily and

and have lost the animus revertendi but as long as this is not gone it is an actual possession tho' the animals are at a distance and out of the reach of the owner. When such animals have voluntarily strayed away and the owner has lost the possession the first occupant holds it ag<sup>t</sup>. any other person who comes — An injury done to such property is to be redressed by an action like that instituted for an injury done to other kinds of property — Taking of these animals animo furandi or with an intent to steal is not felony unless the animals so taken are of real use to the owner such as bees &c but if the animal be such an one as is kept merely for the whim or caprice of the owner such as a dog - cat - parrot &c it is not theft but an action of trespass only lies —

There are two ways of acquiring such property



1<sup>st</sup> by what the Civilians call per industriam

2<sup>d</sup> per impotentiam ~

7. The first method per industriam is where a man by his own industry has taken the animals and therefore acquired a property in them, occupancy - The greatest contest that has arisen about animals acquired in this manner has been concerning that -

### Of Bees

and it is still a dispute in England whether the property in Bees belongs to the owner of the soil where the bees are found or to the finder but generally as to all animals the property is in the finder - Of the law in this respect in Connecticut ~

In this State there is no dispute and that which in England has arisen by reason of their Forest Laws by which there the owner of the soil is entitled to the honey found there, therefore say they he is naturally entitled to the bees - but as those laws do not extend there

unreasonableness to this country there can be  
no dispute respecting this doctrine respecting  
bees and in Connecticut it is no trespass for  
a man to enter another's close in pursuit of  
these animals - however if the enterer commits  
any unnecessary injury he will be liable in  
an action of trespass - In this State a man  
having found a hive of bees in a tree may  
cut down that tree whose ever it may be:  
but he must pay the damage to the owner  
of the ~~tree~~ tree if there be any damage - tho'  
this injury is generally so small that it comes  
within the maxim *de minimis lex non curat*  
if the finder is liable it is not an action of  
trespass *vi et armis* but must be sued in  
an action on the case ~

2<sup>dly</sup> The other method of acquiring this  
property is what is called *per impotentiam*  
that is when animals come within a  
man's possession and cannot get out



tho' ~~weakened~~ the owner of the soil is  
entitled to them exclusively as if a Bird  
hatch her young on a mans ground he  
is owner of them. Tho' animals ~~for~~ <sup>as</sup> nature

## Of property in Water, light, air &c

In then a person may also have a qual-  
ified property - this altho' continually  
changing while the persons possession is  
his. All large rivers and arms of the  
sea are considered in the same point of  
light as highways &c and belonging to the  
publick while small streams &c are private  
property of individuals and of those tho'  
whose lands such streams run. And the  
rule to know a trespass respecting <sup>on</sup> these  
kinds of property is "whenever such stream  
&c of water is navigable for the smallest craft  
whatsoever as for even caroes then it is consi-  
dered as belonging to the publick and would

be no trespass to fish therein & unless there  
be an exclusive grant of the fishing in such  
stream & to some person by the government.  
This property which a man has in water  
may be violated: as if a man turn the water  
out of another's possession & and if this person  
who turns out the water while in his own  
possession and thereby turns it from another  
he is liable in an action on the case.

This property in water is ~~not~~ conveyable  
and may be conveyed without the land  
thro' which it passes & this privilege comes  
under what is called an incorporeal heredi-  
tament it cannot be handled seen &  
but is real property and depends to the  
title. A right of passage over another's  
land is also an incorporeal hereditament  
and is governed by the same law as that re-  
lative to water & above mentioned.  
A person who has a dwelling house in any  
place has a right to as great a quantity of water



brity of air, freedom admission of light be  
as is convenient and if this right be violated  
by any person there is a remedy by an ac-  
tion on the case.

Personal property may be held in  
jointtenancy and tenancy in common  
like real property and is governed by the  
same law that is the property is not devi-  
sable because the *ius accrescendi* takes place  
that is if a jointtenant dies his partner  
takes the whole - There however to this  
rule two exceptions - Merchants in C<sup>o</sup> are  
not considered as jointtenants that the *ius*  
*accrescendi* will take place nor are they gov-  
erned by the law of jointtenancy - So again  
if two persons jointly purchase stock such  
as oxen horses &c for the purpose of carrying  
on husbandry they are not jointtenants  
all other personal property may be held in  
jointtenancy - The above is English Law  
only for the doctrine of jointtenancy is not

known to exist in Connecticut and this  
has been so determined by Our Sup. Court

In N. York in order to make joint tenancy it must be expressed in terms in the contract, if it is not he holds as considered as tenants in common

### Of a Chose in action

A Chose in action depends entirely upon a contract expressed or implied: for if a person has done an injury by which damages are to be recovered such damages are not a Chose in action untill there be an actual judgment - A Chose in action cannot be sold yet a person may devise it, but he cannot devise an action pending for an injury; for a right of action is no title upon this principle it is that a man swear out of Court altho' he has an action pending, for an assault and battery by which he is all probably may recover £50 or £100 - So if



has been guilty of working unscaled  
leather and B brings forward a quitclaim  
to recover the penalty but while the action  
is pending B is arrested and committed  
to Goal The action brought will be no in-  
judgment to B's swearing out of Goal.

### Of Occupancy

There are several cases in which persons are  
said to acquire property by occupancy The most  
common case is where a person finds property  
lost by another - in Eng<sup>d</sup> the finder obtains  
an absolute property (if the loser be unknown)  
except in some cases where the property is ta-  
ken away from the finder and given to the  
publick, as if a man discovers a ship wreck  
he acquires no property in it but it goes to  
the publick - In Connecticut the Stat:  
has taken away almost all the property from  
the finder for if he cannot discover the loser

vide  
Comm.  
Hart:

he is to register it in the town clerk's office  
and after a certain time if no owner appears  
the property is sold and the money goes into  
the treasury after expenses paid. It is ap-  
prehended that money altho' not expressly ex-  
cluded is not included within the Statute &  
the Sup. Court have determined that it is  
not upon the ground that it was not the in-  
tent of the legislature and it would be absurd  
to sell money as the Statute has directed  
shall be the property which is found.  
There are cases where the loser loses all prop-  
erty in the article and can never recover it  
from the finder as if a person abandon his  
property as to throw away his money &c.

### Of the ownership in Emblements

That kind of property which a person acquires  
in Emblements is said to be gained by occupa-  
cy and the property which a man has in  
this is of a mixed nature partly personal &



partly real or rather the Emblements are  
sometimes considered as personal at others  
as real property: before the Stat: of Wills  
Emblements were considered as personal  
property they being devisable whereas real  
property of any kind was not: in another  
point of light they are considered as real for  
before and since that Statute if land be  
sold and the emblements not expressly ex-  
cepted they pass with the Land: Again  
emblements till lately (when they were made  
so by Stat: of George) were not considered  
as being liable to be taken on an Execu-  
tion and was exempt in the same way as  
land - So again stealing emblements was  
not considered as felony therefore they in that  
case were considered as real property: but  
on the other hand emblements go to the Ex<sup>r</sup>  
as personal property: and when too a man

is convicted of a crime whereby he forfeits  
his personal property his ~~emblem~~ emble-  
ments are confiscated —

A very nice distinction has obtained  
to consider emblements personal or real  
with regard to bringing the action of  
trespass or trover: for if a man enters another's  
close and cut down his wheat and carry  
it off immediately it is trespass the emble-  
ments being considered as real property but  
if he enter and cut it down and then go  
about other business and afterwards return  
and carry away the corn or wheat which  
he had before cut down it would be considered  
as personal property and trover or theft  
might be the action — This is the English  
law upon the subject and our courts have  
shown a disposition to adhere to these  
principles — and distinctions —

As has been observed a man may have a  
right to a stream of water: but this may pass



thru' the land of 20 different persons and in such case each one has a right to occupy it. yet the Law recognizes the right of the first occupant and his right is not to be infringed by any one of the others for inst: A. B. & C. own lands adjoining each other and a stream of water runs directly thru' each ones close - C. however was the first occupant and on his land he erected a Mill - A and B who own above C. cannot either of them divert the water from C's Mill or obstruct it in its natural course - yet they both may occupy the stream by other mills provided they let the water run naturally: for so long as C. has the benefit of the water he cannot complain - So if A had been the first occupant he might have diverted the water from its natural course on other lands of his - and leave the mills of B and C. without any water from the stream whatever - finally the first occupant has an uncontrollable authority over the stream and may do with it as he pleases.

## Of accession of property

The doctrine of accession being ranked under the head of Occupancy will require the following observations — To define it by example — When one takes the property of another and advances its value by putting it under a state of improvement <sup>it</sup> is said to be property by accession — From this view of the matter arises a question whether the owner shall be entitled to the improvement made by the last occupant or not: The following case perhaps will elucidate this subject — Inst: A having enticed away B's wife furnished her with a rich suit of clothes B afterwards obtained his wife and there was a question made whether B. should also have the clothes and the Court determined that he should hold them — so long therefore as the property remains in a state of improvement only the original owner has a right to the



article improved but when the nature of  
the property by the last labor is changed  
as apples made into cider, wheat into flour,  
& the original owner is entitled to the  
damages only - for by such a change  
the nature of the orig<sup>l</sup> property is entirely  
changed and annihilated ~

## Of Confusion of property

This happens when one person mixes  
his property with another as if A willfully  
throws his wheat into B's bin where he has  
wheat and the two kinds of grain <sup>become mixed</sup> By the  
Civil Law such property is not absolutely lost  
and if it cannot be ascertained how much  
of A's wheat was mixed with B's or if they  
cannot agree <sup>a small recompense would be given</sup> but if it was not willfully done  
a recompense will be allowed A - By the  
English Law such property is wholly lost and  
no recompense is granted and the same is the  
case in Connecticut -

## Of the Title to property taken from an Enemy

Property gained in this manner is said to be acquired by occupancy and we should naturally suppose that any person had a right to take the property of an Enemy when he could find it and whenever he pleased: but this appears to be not the case and to prove private plunder and inhuman bloodshed it has become the law of Nations that no person shall take the property of an enemy without licence from the government to which he belongs and if he should do it without such licence it would be criminal and property thus taken after the conclusion of the war and in time of peace <sup>an</sup> be recovered as law.

However if an Enemy introduces goods into the country with which he is at war they may be taken by any person without licence and goods thus taken are acquired by occupancy. But if one nation declares war ag<sup>t</sup> another and at the time of the declara-



tion of War a nation of one country has  
goods in the other those goods may not be ta-  
ken — Where goods are taken by an Enemy  
and retaken the recaptors do not hold the  
property but the original owner may have  
them at any time upon paying Salvage  
unless the enemies who have first taken  
them have carried them into port, if they  
after this are retaken the recaptors hold  
them by occupancy —

### Of the <sup>right</sup> of authors to their labours

The right which authors have in the pro-  
ductions of their genius seems to have been  
a question which has been much litigated &  
is not at present settled — If a man has pub-  
lished to the world a work of his own produc-  
tion whether any one has a right to republish  
it without his licence or without having  
bought a copy right is the question? This ques-  
tion is supposed to have originated from appli-

applications made to Chancery by Authors to grant  
injunctions ag<sup>t</sup> persons who were about to  
republish the works - At length a Statute of  
Anne was made encouraging Authors by  
allowing them 14 years to enjoy their Copy-  
rights uninterrupted: but it was still a ques-  
tion whether at Common Law Authors  
had an exclusive right to the profits of their  
labours - The question soon after arose and  
was determined by the Court of King's Bench  
in favour of Authors - a Writ of Error was  
taken to bring the question before Exchequer  
but before the trial there, it was compound-  
ed: In the reign of George the 3.<sup>d</sup> the question  
Barrington came up and in P. R. it was ag-  
determined by three judges ag<sup>t</sup> one (who was  
one of the counsel in the former case) in favour  
of authors - On this judg<sup>t</sup> a Writ of Error  
was brought to the House of Lords where the  
opinion of the 12 Judges was called for and  
3 questions were made - 1<sup>st</sup> whether an author



at Com: Law has an exclusive right to his productions - 2.<sup>d</sup> If so whether the Stat: of Arts affected that right: 3.<sup>d</sup> And whether the present respondent has a right: The first question was determined in the affirmative by a majority of two (7 ag<sup>t</sup>. 5) the 2.<sup>d</sup> negatived by a majority of one and in the last they were equally divided - It falling then upon the Chancellor to give the casting voice who gave it ag<sup>t</sup>. the right of authors so that it may still make a question.

### Of title by prerogative

No such title obtains in this Country and for the English Law upon the subject (Vide 2.<sup>d</sup> Vol: Black: Com. ~)

### Of title by forfeiture

Vide 2 Vol Black: Com: 421 ~

There is a distinction between the forfeiture of real and personal property: where

a man by any crime & forfeits his real Estate all the real property he owns at the time of the commission of the crime is forfeited and a sale of land between the time of commission of the crime and conviction would be fraudulent and void: but the personal <sup>only</sup> property that he owns at the time of conviction is forfeited and a sale in the meantime would be good.

### Of title by succession

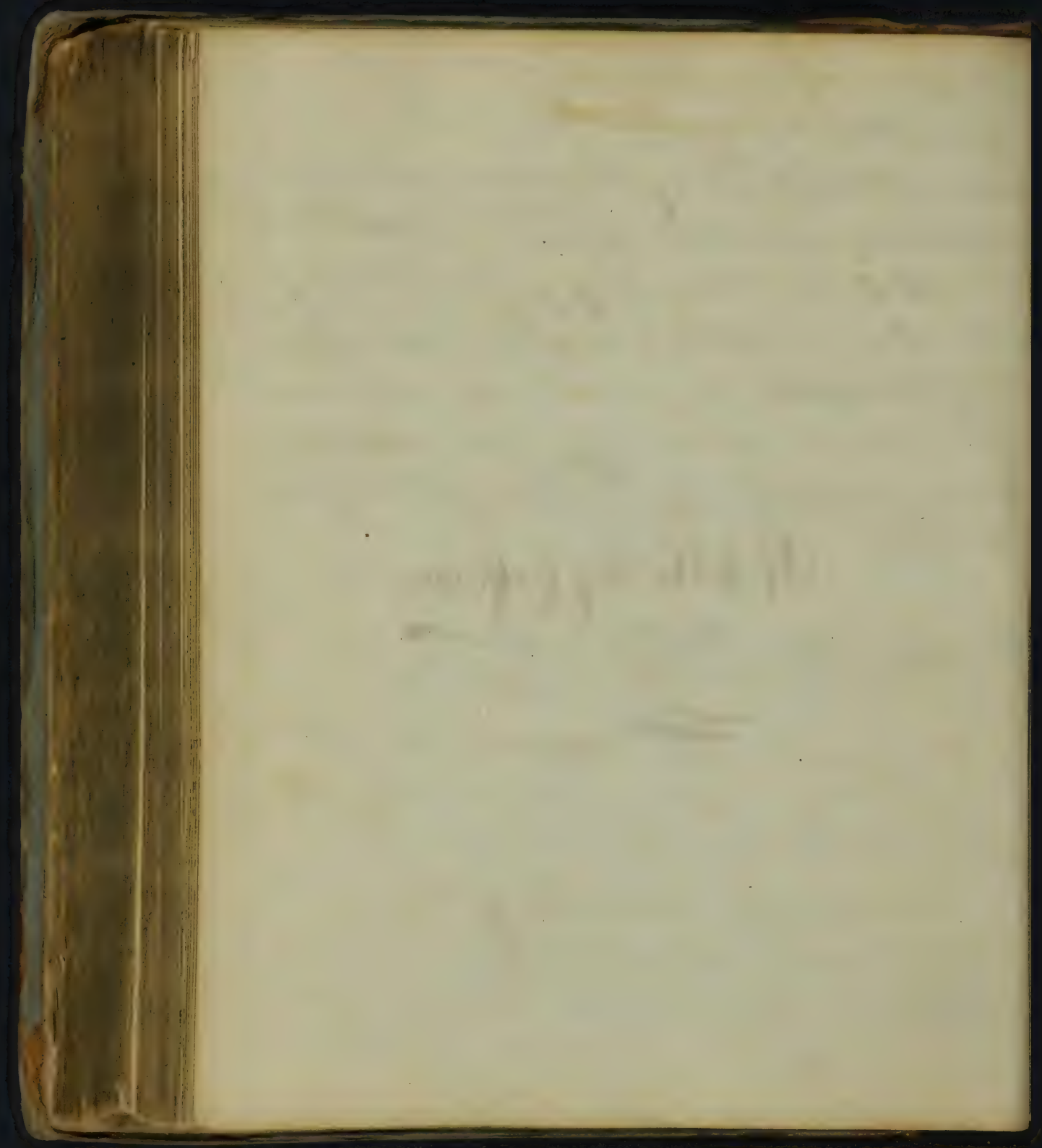
Title by succession is where goods that they are given to a corporation aggregate and vests in their successors and the reason is because a ~~corporation~~ corporation is always considered as being of the same altho' the persons forming it are constantly changing but a gift of personal property to a sole corporation as a Bishop & does not go to his successors till he is appointed and from the death of the one to the appointment of the other the land would be in



abeyance which never must be neither  
agreeable to the English law can be - how  
ever notwithstanding there was goods given  
to the Chamberlain of London altho' he  
is a sole Corporation they go to his succes-  
sors - And it is to be remarked that volun-  
tary ~~associations~~ associations are not consid-  
ered as corporations aggregate untill they  
are incorporated by an act of the Legisla-  
ture ~

## Of title by Custom

Vide 2d. Black. Comm. 427 ~





# Of Evidence

There appears to be no subject about which Courts are more <sup>in their decisions</sup> doubtful than the admission of testimony, and which Courts <sup>to give their judgment</sup> being called upon without thought ~~it may be~~ <sup>are never</sup> ~~are~~ more mistaken. The general rule respecting testimony is: "that the best evidence the matter in dispute will admit of is to be had must be produced, tho' this rule upon examination will not be found to prevail in its full extent in many cases - to explain this rule, it may be remarked that the evidence adduced <sup>must</sup> ~~does~~ not carry with it any proof that there is any evidence behind of a nature superior to that ~~offered~~ offered - for Inst: the copy of a record under the English Law attested by the proper officer or a copy compared to <sup>the</sup> register, book and sworn by the party to be a true copy of record is admissible evidence and is said not to carry with it evidence of an higher nature and ~~is~~ indeed is the only evidence the case can admit of - for the records cannot

be moved from the place where they are ~~at~~  
stationed - But if a person has a sworn copy  
which he is about to offer as evidence and it  
be in proof that he has an attested copy in his  
possession the ~~copy~~ sworn copy will be reje-  
cted as not being the highest evidence that the case  
will admit of - The law as in this State is other-  
ways as will be hereafter shown - Further  
the evidence offered need not carry with it evidence  
that testimony of an higher nature can  
be adduced <sup>or by</sup> provided from all the circumstances  
taken together it can be collected that <sup>there is</sup> better evi-  
dence is left behind - Inst. A has a note of hand  
ag't B. to which C was a witness and having  
sued it in Court calls up D who was a by-stander  
to prove it - such proof will be rejected - So  
again if parol proof be adduced when it ap-  
pears that the same is in writing it will be re-  
jected - as if A be about to swear that such a  
transaction was on the 5<sup>th</sup> of Feb. when in fact  
he has a memorandum that it was done on  
the 8<sup>th</sup> of Feb - his testimony will be rejected  
until the memorandum be produced



and then it may be admitted to explain the writing - Thus testimony may be admitted tho' not the best the nature of the case would admit of, yet if on the face of such testimony there appears to be proof of an higher nature it will be rejected or if this does not appear on the face of the testimony yet if collected from other circumstances that there is better evidence behind it will be rejected

### Of testimony written

Note the true spelling is testimony

Written testimony is first, that of Records by which are meant Legislative or Judiciary acts. There are however other ~~acts~~ matters of record which are not properly judiciary acts as records of marriages, births &c these properly speaking are memorandums only.

So again private acts of the parties as Deeds &c are said not to be records but memorandums made <sup>and recorded</sup> by the ~~proper~~ proper officer - The law as to each of these is different as it respects proof

properly under the denomination of records  
but things recorded - and the law as just men-  
tioned is different as respects each -

### Of Records

The <sup>testimony</sup> ~~record~~ is a copy accompanied with  
that evidence of the truth of its being a true  
copy which the Law requires - but private  
records as they are improperly called as mar-  
riages & may be proved in this State by per-  
sons who were present at the celebration of  
the <sup>marriages</sup> ~~marriages~~ - There however appears to be no rea-  
son why a copy should be admitted in  
any instance unless attested by the proper  
officer for in this way a man may at any  
time forge a record and have it sworn to &  
by iniquity make out his case: It has been  
contended that a copy of a record is the only  
evidence that can be adduced and that the re-  
cord itself would be no evidence - but such a  
proposition as this seems idle in the ex-  
treme and needs not the weight of argu-  
ment to confute it: for that any time



may be evidence of which a Copy would be evidence - As a general rule a Copy of a Copy cannot be admitted as evidence. for if you have the first copy duly authenticated then is there in your power testimony of a high nature; if not, proof is wanting of the first copy - Of Legislative Acts

Some of these are publick and others private - A publick act is that which relates to the community at large - A private act is that which does not relate to the whole class of people - but ~~has~~ to an individual - Generally publick acts relate to the genus while private ones relate to the species -

The Statute Law Book is considered to be the evidence of a publick act in a Court but this is not evidence of a private act but it must be a copy of compared with the Parliament roll - but no such distinction has obtained here - The Statute Book is

always evidence <sup>or</sup> a single act when printed  
by the printer of the State neither do we require  
any other evidence of a law of another State  
than their printed Statute Book and I believe

Mr. B. They do in general in all other States if it is made  
a point - By the English law it is a general  
rule that a Statute may be given in evidence un-  
der the Gen<sup>l</sup> Issue - to this rule ~~may be given~~ there  
is a material exception: If the law which is to  
be pleaded is such as will avoid any security given  
for a debt or duty then the Stat: must be pleaded spe-  
cially: as for inst: A Stat: is made which enacts  
that a man committing a certain crime shall  
be punished - afterwards another Stat: is made  
under which a man indicted on the former  
Stat: thinks he can shelter himself - He must  
plead this last Stat: specially - By our law any  
act of the legislature may be given in evidence  
under the gen<sup>l</sup> issue - 'tis true it has been the  
practice to plead specially any Stat: that  
will avoid a security given for a debt duty &c



By the English Law private acts must al-  
ways be plead specially - In Connecticut a private  
act may be given in evidence under the gen. if  
sue: it would seem that there is no difference  
between pleading a private and public act  
but a private act cannot ever be taken ad-  
vantage of unless plead; but a public one  
may and this is the distinction between  
them - Public acts of other States however  
must be plead or cannot be taken ad-  
vantage of

Of other kinds of records - as Judgments &c  
Judgments of Courts & must come either un-  
der the seal of the Court where the Court has  
a seal or a copy may be proved by the oath of  
a person who has examined it to be a true  
copy, yet if the issue is not trial record it must  
be under the seal of the Court when used under  
such issue: but when the issue is upon some  
fact a copy sworn to is sufficient - So again  
where the officer from which it issues has no  
seal as in case of a Justice of the Peace, the ar-

ificate of the officer entrusted by law is suff.  
evidence but a copy sworn to by the examiner  
is admissible - in these cases here it has been hi  
therto deemed sufficient evidence that the Clerk  
of the Court certify the Copy to be true without an  
seal or in case of his absence or ~~inability~~ inability  
of one of the judges makes the certificate yet  
when such copies go out of the State they have  
not been admitted as evidence without a seal  
when by law the Court has a seal unless it is  
in proof that such Court has not obtained a  
Seal.

In Office copies the proper officer's certi  
ficate has been deemed the only evidence unless  
absence or inability has prevented his certifi  
cate, in such case a copy sworn to has been de  
ed sufficient.

Article has obtained in the En  
glish Law that such records or writings as  
derive their credit solely from the Seal of  
the Court or certificate of the proper officer  
are to be delivered to the Jury who try the cause  
when they withdraw from the Court to agree



upon their Verdict - but sworn copies and other writings used on a trial which derive their validity from the oath of witnesses are not to be delivered to the jury - with us every writing used on the trial is committed to the jury - The English Law however prevails in most of the U. States

A judg<sup>t</sup> of another Court upon the same subject may in some cases be given in evidence - If this judg<sup>t</sup> however is after the verdict of a Jury; it is proper the verdict only be given in evidence rather than the judg<sup>t</sup>.

It is however apprehended that a verdict never ought to be introduced as evidence for it is no more nor less than the opinion of 12 men and if these 12 persons had been evidences in the cause their opinions certainly w<sup>d</sup> have had no weight and moreover their verdict was founded upon the evidence before them at the time of trial and ~~perhaps~~ perhaps the evidence is not the same

at all the trials

A Verdict may be admitted where the parties are the same and the point the same as that on which the verdict is given: it is not necessary however in a case of trespass or that the land be the same piece: as if A trespasses upon my garden and then upon my meadow: If I sue him for the trespass on the garden and recover and afterward sue him for the ~~trespass~~ trespass on the meadow the Verdict in the case of the trespass on the garden would be admissible

By the "same parties" is not meant exactly the same parties in every case but if the present parties are prejudiced by the former verdict

they will be considered as being the same parties for inst: A leases to B a piece of land C brings a writ of Eject. agt. B. and claims the land as his own - B. vouches in A as the person



under whom he claims and recovers. A. afterwards leases the same land to D. C. a gain brings his writ of Eject. aft. D. The former verdict is admissible evidence in the latter case ~

It has been a question when A. was sued by the publick for some crime (say breaching the peace) in committing which he injures B. in the publick action B. is bro't in as an evidence to prove the fact and the publick recovers. Afterwards B. brings his action for the injury which A. did to him and the question was whether B. in the above case could make use of that verdict - It is now settled that he cannot - why it would have been made a question is ~~very~~ mysterious: for it would be letting B. take a direct advantage of his own evidence given in the former trial ~

An Execution is evidence without the jury. or not according as the person who offers it

if it is the Pl<sup>t</sup> who offers it to defend himself  
or to establish a title, he must show a judgment  
for if he had none he is a trespasser or if it were  
a void judgment it is the same thing - as if A.  
imprisons B. on an Execution and B. afterwards  
sues him for false ~~imprisonment~~ imprisonment.  
A. in order to defend himself must bring  
in the judgment: for the Execution will not be  
sufficient; for if he had no judgment or if the judgment  
was void he is a trespasser if not let him bring  
it in: but if it be the officer who defends will  
be charged as a trespasser it is admitted by all  
in many cases it is sufficient to show an Ex<sup>co</sup>  
issuing from a Court of competent jurisdiction:  
on the other hand such execution will  
not defend him if it appears on the face of  
it that there was no authority to issue it: on  
comparing execution with the general laws  
of the land ~~which~~ which person must know  
at his peril, there appears there could be no au-  
thority given - Example: An officer receives an



execution to levy, which upon the face of it  
appears to be for £22. and issued from a Jus-  
tice of the Peace - here it plainly appears that  
the Court had no jurisdiction whatever if there  
the officer levy execution the sum of which is not  
tryable by the Justice it will not defend him. But  
if the Execution on the face of it was but £8. the  
officer is not to go to the records of the Court and  
find out whether it was recovered in an action of  
trover or any other action.

By some it is contended and there are many  
authorities to support this opinion that if  
the subject matter of the suit was not within  
the jurisdiction of the Court all the proceedings  
being before a Court not having <sup>jurisdiction</sup> are void  
non judice the judgment is void and every  
thing done by the officer is a trespass whilst others  
suppose the true rule is where the Court might have  
granted an execution for any thing that ap-  
pears to the officer he shall be justified as in  
the above example - The rule as established  
in Connecticut is founded on different principles

which is apprehended to be the true solid principles to be ~~extracted~~ extracted from the authorities upon the subject viz, if the Ex. on the face of it appears that the Court might issue such an Execution or by comparing it with the general laws of the land which every man must know at his peril it appears that the Court had such authority the officer may proceed to execute it as the law directs and in event of the suit being wrong non judice the officer ~~may proceed to execute it as the law directs~~ would not be liable but if the execution carries upon the face of it a judgment which the Court had no authority to render or if it be not consistent with the general ~~the~~ laws of the land the officer shall be liable.

The English authorities upon the subject are as follows the first case that we find is the notable case called the Marshalsea case reported in Coke which maintains it & it is in 11th. if he lives an Ex.



which was ~~even~~ non judice ~~at this~~ <sup>that</sup> it  
does not appear upon the face of it but <sup>it</sup>  
has been before a proper forum - There is <sup>Har</sup>  
afterwards another case reported in Hardress <sup>400</sup>  
determined the same way and upon the au-  
thority of the Marshalsea case - There is also  
a third case reported in Willson Prescott v. Green  
determined like the two former and upon  
their authority - All these cases are determin-  
ed upon the authority of the Marshalsea there-  
fore if that can be struck to the ground they  
must all fall with it: The case of Prescott <sup>12?</sup>  
v. Carpenter and Mann in L. Raymond it is <sup>Bray</sup>  
apprehended goes the whole length of this: in <sup>22</sup>  
that case it is said the resolution in the case  
of the Marshalsea is a hard ~~one~~ and the  
authorities there cited do not support it which  
is the same thing as to say that case is  
bad law and we will adopt a different prin-  
ciple - The examples set by the Court in the  
1st. Marshalsea do not strengthen that

deception in the least; it is there said that  
if the Court of ~~Commons~~ Comm. Pleas (which  
has no jurisdiction over murder) should  
issue an ex<sup>r</sup>. ag<sup>t</sup>. a man for murder worn  
murdering the officer to hang him and  
the officer should hang him the ex<sup>r</sup>. would  
~~should~~ shield him but he would be liable.  
true he would be liable; for upon  
the face of the ex<sup>r</sup>. it appears that the Ct.  
had no jurisdiction and therefore he would  
be liable - Another case put by the Court, is this  
by the laws of Eng<sup>d</sup>. it is necessary that the  
sheriff's court be holden on the first Tues-  
day of May and say the Court if they should  
issue an ex<sup>r</sup>. on the 2<sup>d</sup> Tuesday and the officer  
should levy it he would be liable. This too is  
true but the reason why he would be liable  
would be because it was worn nonjudicial  
and it appeared on the face of it that the  
Court had no authority to issue on that day.  
This the officer should know and therefore  
he is liable but if he did he would be liable.



Therefore upon the beforementioned prin-  
ciples it is apprehended that the case of  
the Marshalsea is not Law; but the rule  
above laid down it is conceived is the true  
rule and must govern ~

If any part of a process which has  
been used is wanted to be made use of you  
ought to have a certified copy from the  
proper officer unless it be where a writ  
is wanted - then a certified copy is not  
necessary but parcel proof will be admit-  
ted to show that, that writ actually did ex-  
ist it appearing by the files of the Court  
that there never was such a ~~writ~~ writ  
returned ~ Proceedings in a Court of Law  
such as Declarations, pleading &c never  
will be admitted as evidence but directly  
the reverse obtains in a Court of Chancery  
they always being admitted as evidence  
for in Chancery he who pleads pledges him-  
self for the truth of what he pleads and

his Confession at any time may be as-  
sented to for the truth of what he states - &  
no man will be presumed to carry for-  
ward a falsehood - Therefore proceedings  
in Chancery will be admitted either for or  
ag't a person - The Defend'ts answer in Chan-  
cery is considered as an oath and may  
be admitted as evidence and taken ag't him  
an infants answer which is common-  
ly made by his guardian however is never  
to be improved ag't him -

Whenever the answer is introduced  
as evidence ag't a man the bill to which it  
was an answer must also be produced  
formerly however it was held that the  
bill when lost need not be bro't in: the  
practice it is apprehended originated from  
Court of Chancery's not being a Court of record  
as much as any other: The bill <sup>now</sup> must be  
bro't in together with the answer - The bill  
and answer being produced it need not be  
alleged that the answer was sworn to



for that is presumed unless the contrary appears

An affidavit is the oath of the party to the truth of a certain fact as if A wishes to have his cause continued to the next term because of the absence of a material witness, he comes into court and there makes oath that such a witness is out of the State &c and such affidavit is good evidence but it must be proved to have been sworn to - and it must be produced itself and not a copy as in the case of an answer

### Of Depositions

Depositions are the usual evidence in a Court of Chancery in Eng<sup>d</sup>. ~~A deposition~~ Strictly speaking there could be no such thing as depositions being used in an English Court of Law and when any witness is sick or unable to attend court his deposition never can be admitted till the ~~op~~ opposite party consents and if the other party will not con-

sent the Court will continue his cause till  
he will consent - but when some person gets  
in a suit who is willing to have the suit con-  
tinued the Court has no hold of him and the  
other party must go without his testimony  
unless the witness can be produced into  
Court - But depositions taken and made use  
of in Chancery may be and often are used in  
suits of Law whether both parties consent or not  
provided the witness who testified cannot be  
brought into Court tho' any reasonable means  
this the Eng<sup>l</sup>. Law. These Depositions  
in Eng<sup>l</sup>. are taken by Commissioners appoi-  
nted for that purpose.

Cases often happen when a person wishes  
to get the evidence of some person who is  
old decrepid &c who it is supposed will die in  
a short time <sup>even</sup> when he has no ~~cause~~ <sup>action</sup> instituted  
in this case by an application to the Court  
they will grant a *decimus protestatum* or a  
power to take the depositions of that person  
by *decimus in memoriam* or in person



tual memory of the thing -

In Connecticut we have a late Statute enabling testimony in perpetuam rei protestationem to be taken in much the same manner as in England only the application for a *Quodammodo* protestation must be to the Sup<sup>r</sup> Court - In this State viva voce evidence or Deposition testimony is used in our Courts of Law and Equity too - See our Statute respecting witnesses where the causes of a deposition are stated at length

Both by the English and our law what a person has said not under oath is not evidence neither is it evidence what a person has said out of Court notwithstanding he has been regularly sworn -

When a judg<sup>t</sup> is introduced it is not only evidence but it is conclusive evidence and no averment can be admitted to contradict it unless the judg<sup>t</sup> has been obtained by fraud: in such case it may always be attacked and set aside -

### Of foreign Judgments

As to foreign judgments the law seems to be dif

-ferent: By foreign judg<sup>t</sup> is meant those ob-  
tained in Courts subject to one and the same power  
yet in different countries - and such would be con-  
sidered in England, a judg<sup>t</sup> obtained in Jamaica or  
India: But a judg<sup>t</sup> brought from an island into an  
English Court carries with it only prima facie  
evidence of a Debt; it is therefore not conclusive

Doug:  
1. evidence but may be examined into: But a judg<sup>t</sup>  
obtained in Westminster Hall cannot be examined  
into in England - In mentioning this we must  
admit to a singular practice in Connecticut by which  
great injustice may often be done - It is well known  
here that a man may be sued and ~~the~~ judg<sup>t</sup> obtained  
without notice being given and this may be conclu-  
sive evidence of a Debt - Since the confederation A in  
the State of N. Y. and B in this State who wishes to  
obtain a judg<sup>t</sup> for a sum of money ag<sup>t</sup>. A - B  
being informed that A has property in this State  
(no matter of how small a value) sues out a writ of  
attachment upon it and this is all the informa-  
tion A has of the subject - for says our law, attach-  
ing a persons property is notice of the suit to the  
The Court however must continue the cause.



that he may have notice of the suit: but no one  
feeling interested will not take the pains to give  
him notice and judg<sup>t</sup>. in fact is rendered the second  
Court against him for the whole demand ~~all this~~  
the property attached may not be sufficient to re-  
spond the debt - this judg<sup>t</sup>. is conclusive evidence  
ay? A unless within one year he will come &  
~~petition~~ petition for a new trial and set the  
former trial aside - It is apprehended upon examina-  
tion that the prevailing opinion respecting this  
may in some instances be shaken - In the first  
place the law goes upon the ground that there  
was notice given - and how does the law say this  
why by presumption; then it is founded on pre-  
sumption and presumption in this case is as  
good as all others <sup>and no better</sup> untill ~~not~~ rebutted and when it  
is positively rebutted by other testimony such  
judg<sup>t</sup>. can be attacked as - fraudulent on - and  
says Mr. R. I have once sent a man 60 miles on  
purpose to convey notice in case exactly similar  
to the above mentioned - This also is the nature of our  
foreign attachments - viz upon absconding debtors - A  
man B who resides in N.Y. and leaves a copy of the

writ with C. who is said to be his agent, factor,  
att<sup>y</sup>, or trustee: C. comes into Court and declares  
that he is not an agent &c of B. yet notwithstanding  
this the Court will unjdg. agt. B. for  
the whole demand and this is the practice of our Court  
and will always do complete justice <sup>to the attorney</sup> but they  
will not suffer execution to go out agt. the att<sup>y</sup>. &c

The mode of ~~letting~~ collecting a judgment agt.  
an absconding debtor is to bring a *scire facias* on  
the judgment agt. the factor &c provided he will not  
expose the goods &c but in the case put A is con-  
-fident not to bring his *scire facias* for he knows  
C. has no property of the debtor in his hands but  
he waits untill B. comes into this State and  
then levies his execution upon him - or he may  
in the case put go into the State of N.Y. and  
bring an action of debt on judgment and pro-  
-duce a copy of the judgment as evidence.

Our Courts seem to have contrived a plan  
to get rid of this act by saying that a foreign  
judgment is good for no other purpose than to  
bring a *scire facias*: if therefore a judg<sup>t</sup> be obtained  
against a man in N.Y. and should come into



This State with ever so much propriety it would  
not be attached only by a *seire facie* —

Of the records of Marriages,  
Writs &c — — —

The Law respecting these records is different  
from that of other records and indeed the law  
upon this subject appears to be extremely loose  
and ~~very~~ careless — A record is always expected to  
be produced but it may happen that there is  
no record that it is lost or cannot be found &c  
in such case other proof will be admitted upon  
satisfying the Court that due diligence has been  
made in search of the record —

The certificate of the Clergyman who mar-  
ried the parties is said to be conclusive evidence  
without being sworn to, he being considered  
as a civil officer acting in a legal capacity — He  
must certify that he was a minister and the  
usual certification made use of is V. D. M. —  
That is the "Minister of the word of God"

So again there is an instance in the Books  
of a man setting down the names and births  
of his children in a Bible or Almanack which  
was admitted as evidence ~

## Of Deeds ~

These in their extensive signification take in  
not only deeds of Land but many other writings  
respecting contracts &c ~

It is a general rule in the English  
Law that he who claims by deed must make a  
proffer of it in Court, that is produce it in Court  
on the ground that if he does not produce it  
he would not be obliged to shew it at any time.  
But by our Law it makes no difference whether  
he make a proffer of it or not; but if challenged  
he must produce it in Court; the former only  
then is dispensed with, the law being sub-  
stantially the same ~

In this a distinction obtains in the Eng<sup>l</sup>.



Law that the Deed <sup>need</sup> not be shown altho' the  
reliance be upon it when the party is not  
entitled to the custody of it - Inst: A brings  
an action of ejectment agt. B. who is tenant  
in Dower and places her reliance on a Deed from  
her husband - but the Deed being not in her  
custody having descended to the heir together  
with the land she is not obliged to produce it  
for the assignment of dower is sufficient for her  
and throws the burden of proof on the Plt. and  
he may cite in the heir by a summons called  
a Successorem. But a tenant by the Curtesy  
must produce his deed for it is in his custody

No ~~not~~ such distinction will ~~not~~ exist here  
to the same extent for as all our deeds are recorded  
a copy may always be produced - still however  
the law is the same when the challenge is of  
the Deed itself -

By the English Law the deed itself  
and not a copy must be given in evidence but  
in this State a copy is sufficient - It must be

proved to have been executed and delivered by at least one witness - The same law obtains in this State - This however is leaving the subject independent of any regulations where acknowledgements and recording are necessary - The mode of proving the execution and delivery is to call upon the subscribing witnesses and if they be dead prove their hand-writing from which the execution is inferred - When the deed is 40 years old if possession has gone with it the deed need not be produced for this carries with it conclusive evidence of an execution and delivery of it - So if a deed be burnt a copy is evidence if no copy the contents may be ~~proved~~ proved - If the deed be in the hands of the opposite party a copy proved to be a true copy is good evidence

Of the effect of an acknowledgment before a Justice of the Peace

The fact of an acknowledgment being ascertained proves the execution of the deed but not <sup>the</sup> delivery - This it is said may be fairly presumed from its being in the possession of the Grantee after proof of the ~~execution~~ execution



By our Statute 2 witnesses are required to a deed and it is a rule that if the subscribing witnesses are alive they must be had and it cannot be proved by other persons on the ground that this is not the best evidence the case will admit of.

The witnesses signing to a delivery it is evidence of a delivery if the grantor stand by & see them sign and makes no objection - this implies a delivery.

As to comparison of handwritings - Gilbert says proof of a mans handwriting in civil cases is good testimony but in criminal cases not - Later writers disagree to this and says Mayne it is either admissible in both cases or neither in either - Waller says it is not good in either case - The practice of our Courts in general is to reject it in criminal cases and admit it in civil.

A Copy of a deed which has been recorded has always been supposed to be sufficient evidence but it is apprehended that this is a most unwarrantable

practice and would open a door to fraud forgery  
for a man might forge a deed carry it to the town  
clerk and get it recorded and then when called upon  
bring in a copy of the record and get a good title  
and it is conceivable also that this is in direct opposi-  
tion to the rule that evidence shall not be admitted  
when it carries with it evidence of a higher nature  
being kept back - ~~this is~~ this most certainly  
does for it carries evidence that the deed which is  
certainly higher evidence is kept out of sight -

It was before mentioned that 40 years posses-  
sion was evidence of the execution and delivery  
of a deed - When this is proved in a trial of a case  
of this nature the jury ought to find that there was  
an execution and delivery - but if the jury find  
a special Verdict, "that if there was an execution  
and delivery it was more than 40 years past and  
that the grantee has been in possession & 40 years  
holding under that deed - when such a special Verdict  
is found it appears that the Court cannot find that  
there was an execution and delivery but must give the  
cause agt. the ~~plaintiff~~ person who holds under such  
deed for say they the Court can make no inference



It is in trover when a demand of the thing is  
-view and a refusal to deliver it up is full proof  
of a conversion and when that is proved the jury  
may bring in that there was a conversion. But  
if they bring in a special verdict that there was  
a demand and refusal & still the Court cannot say  
there was a conversion: for here again the rule  
comes in that the Court is to make no inference

This doctrine appears to <sup>be</sup> very idle for one would  
suppose that the Court in such case would as easily  
make the inference as the jury —

A Deed without witnesses or any other solemn  
nity whatever attending it except delivery altho'  
it will convey no land may still be considered  
good as a covenant - for example - A. sells to B. with  
such a deed and afterwards with a good <sup>deed</sup> sells to C.  
agreed on all hands that no land is conveyed by it  
and yet B. may recover upon that covenant agt. A.  
for he acknowledged himself well seized - acknowledged  
a consideration and that he would defend  
the land to B. from all claims whatsoever - This he  
cannot do now evidently for he sold it to C. - B.  
however may sue A. upon the covenant contained

in the deed and will recover: But the vendor  
may be waived and B. sue for the money  
which A in the deed has acknowledged that  
he has <sup>received</sup> ~~received~~. but let us proceed one step  
further - let us ~~suppose~~ suppose in this  
fact that B had entered into possession and  
A had not sold to C nor any body else - could  
A in this case eject B? He could not for Chan-  
cery would compel A to a specific perform-  
ance of that deed and whenever Chancery will  
decre the specific execution of a contract: Law  
will not interpose and thwart that power of  
Chancery

There must be 3 witnesses to a Will  
to convey land if any one of these only however  
can be called in to swear to the fact of his and  
the two others signing it will be good proof  
of a Will - but if the witnesses did not all sign  
at one time (as the case will often happen) that  
will not be good proof for then he cannot  
swear to the others signing



## Of rasure and interlineations in a deed

Where there is an alteration in a deed occasioned by the rasure or interlineation and is immaterial made by the party who does not hold the deed it does not hurt it: but if it be made in a material part whether done by the holder of it or not (even if by consent of both parties) the deed is utterly void - so also it is if made by the holder of the deed whether in a material part or not.

But if the property sold was of such a nature that it would pass without a writing as a horse &c it would vest notwithstanding the rasure for that only parts the ~~contract~~ <sup>contract</sup> in statu quo - and as the horse would pass without a writing so it will vest: where there is a deed of this kind with a rasure &c the writing thus invalidated would be considered as no evidence of a sale - Even additions by consent of both parties after the execution of a deed destroys it.

by the English Law - for say they it is not  
the same instrument that it was when it  
was sealed and therefore it shall be void

Of the Seal  
If the seal be broken from the deed by  
either of the parties or eaten off by the rats  
or gotten off thro' any other accident it seem  
by the English Law that there is an end to  
the conveyance unless the seal be broken  
off in a Court - in that case the conveyance  
remains good for say they when the party  
has got under the protection of the Court  
he shall be in no way injured

In case if a joint deed the seal of one of the  
signers be broken off the whole conveyance  
is thereby destroyed - the reason given is, that  
one seal being broken off say they is evidence  
of a discharge to that party whose seal is bro-  
ken off and one being discharged both are:  
It however is apprehended that the seal being



broken off is no more than presumptive evidence of a discharge. if then this presumption can be removed the conveyance will still remain good - The Court then it is conceived ought to admit parol testimony of the seals being broken off - Now even if this obligation is several and not joint the conveyance is destroyed as to the one only whose seal is broken off - These principles are not settled in Connecticut.

There is an authority in Salh: 201 Newport & Williams ~~which says~~ when it is said that the acknowledgment of the party in a Court of Record is good evidence of its being sealed and delivered and such an acknowledgment stops a man from pleading Non est factum and said the Court it is the acknowledgment which gives credit and not its operation or contents - They also held a sworn copy of a deed <sup>enough</sup> good evidence - Miller N.P. 252. 3 L. 307.

As to writings not under seal as notes  
bills of exchange &c by the English law the  
holder may bring an action of indebted-  
ness ~~as~~ <sup>in</sup> assumpsit declaring as on a special pro-  
mise and give the note bill &c in evidence

In Connecticut it is said all our notes of hand  
&c must be considered in the same light  
as specialties are in England and therefore  
the action must be founded on them and  
not on the promise and it is true it is the  
universal practice among us to bring the  
action upon the note &c itself — It is how-  
ever apprehended that this opinion carried  
the matter too far — The true rule as extracted  
from principle, practice &c it is apprehen-  
ded as the only true one is, that if the writ-  
ting acknowledges a Value rec<sup>d</sup>. (as do our  
notes &c) then are they and not till then  
as specialties in England and the action  
must be brought on the writing, but if the



writing does not acknowledge a Valuer as  
a bill of sale - single Bill & the action  
may be founded on the promise and the  
writing given in evidence.

## Of parol Testimony

Of those persons who cannot be wit-  
nesses.

Persons are said to be incapacitated from tes-  
tifying on two grounds - 1<sup>st</sup> For want of integre-  
ty - and 2<sup>d</sup> Want of discernment - Under the  
first of these heads are included interested per-  
sons - A person who is interested as a general  
rule cannot be a ~~wit~~ witness because of his  
want of integrity in that particular case: for  
it is supposed that the most upright person  
whatsoever would be inclined to testify in his  
own favour - but when a person is only ap-  
parently interested (as a Guardian <sup>in</sup> an  
action brought by an infant - a trustee in an

action but concerning the property of which  
he is entrusted &c) he may be admitted as an  
evidence,

There is an interestedness in the event  
and interestedness in the question litigated.  
As to that in the event it is where a person  
can become liable to pay a sum of money  
by the determination - Interestedness in  
the question where a person is in the same  
circumstances as one of the parties contending  
as <sup>2</sup> men at the same time borrow money  
of another and give him an usurious & a  
security both alike for the payment - one  
of the borrowers is sued and his defence is that  
the contract was usurious - the other borrow-  
er is interested in the question - So again  
if A assault B and is sued by the public  
for a breach of the peace and B is called in  
as a witness - he is interested in the question  
for if the public prevail he can recover damages



bring his action ag<sup>t</sup>. A and recover but  
on the contrary if the publick said he cannot  
maintain an action ag<sup>t</sup>. A.

Having premised what is meant by an  
interested witness in the event and in the  
question we shall now remark that by  
our law and the English - ~~that a person~~  
person interested in the ~~an~~ event is excluded  
always from being a witness.

Formerly persons interested (by the Eng<sup>l</sup>.  
law) in the question were sometimes ex-  
cluded and sometimes admitt<sup>d</sup> and the au-  
thorities are directly contradictory appear-  
ing to be governed by no principle whatever.

But it is now absolutely determined and  
the rule fixed in the case of Bent & Bather 3 D<sup>on</sup>  
reported in 3 D<sup>umf</sup> that a person who  
is interested in the question is an admissible  
witness - The same doctrine was hinted at  
by L<sup>d</sup>. Mansfield in the case of Abrams & Burn

Tho' The rule was not established then - In  
this State it is determined directly the con-  
trary that interestedness in the question  
excludes persons from being witnesses.

It is agreed on all hands that where a judg.  
can be made use of in favour of a witness he  
is interested in the event - Inst: A and B are  
assaulted by C - A brings his action agt. C  
and offers B as a witness to prove the fact  
for if A obtains on the testimony of B. - B.  
will also bring his action and offer A as a  
witness - but suppose A obtains his cause agt.  
B. in an action avails himself of the judg.  
obtained by A? The Courts say not for the  
fact of A's obtaining judgment agt. C is not  
a record of which B can avail himself - B  
therefore would not be excluded as a witness.

When Members of Corporations are  
admitted as witnesses -

In this, ours and the law <sup>of Eng.</sup> are materially  
different -

See the following authorities: Hawk: 532  
122 2001 of 7 R. 141 - also can  
Holt 005. St: 720 - 595  
112 2001 of 7 R. 141 - also can  
Holt 005. St: 720 - 595  
112 2001 of 7 R. 141 - also can  
Holt 005. St: 720 - 595



The rule seems to be, Where the question is such that they may be supposed to have as much interest on the one hand as on the other they Courts will admit the members of a Corporation to testify - (Considering the town a corporation - then for inst. to apply the rule: In the case of an indictment for not repairing a bridge - In this case the inhabitants of the town are admitted as witnesses altho' interested in the event for they pay their rateable proportion to support the bridge altho' perhaps small yet the law will not notice any distinction in the sum or quantity of interest - The ground of such an admission as just mentioned is - that altho' the complaint is against the town yet the inhabitants are called upon to testify for their general convenience and public safety will more than over ballance their small interest as individuals - and it is a rule where the ballance of interest is equal the witness is to be admitted as

for inst: if A in consequence of his swear-  
-ing would oblige himself to pay £20 to B  
or C they being the parties ~~to whom~~  
if either obtained in the suit he would be  
admissible but if swearing for one he  
would be obliged to pay £20 - or for the other  
£10 or any less sum than the £20 his in-  
tention would be clearly discoverable and of  
course not admissible - In the case of the  
town just it would be different if it was an  
action to recover damages for a loss suffered  
in consequence of a bad bridge - for this pay-  
ment of damages would not be of general conven-  
-ience to an individual inhabitant therefore  
not an admissible witness - So it seems if this  
be a private action an inhabitant not admis-  
sible but if prosecuted by an indictment or by  
the public such inhabitant is admissible -  
for then the consequence will be that there must  
be a bridge



## Of Donations to Corporations

The members of a Corporation are witnesses to a donation, <sup>for a publick purpose</sup> as if A make a present of a bell to the parish of L. in this case the inhabitants are admissible testimony but it is otherwise if that publick purpose was such as they were obliged by law to <sup>be</sup> at expence about and were relieved by the donation.

By our law members of corporations are ~~not~~ admissible testimony except the agent and there appears to be no sound reason why he should be excepted any more than any other person and in one case where neither agent or other members <sup>of a society</sup> can be witnesses and which is this ~~that~~ that if the contract was an agreement which might have been reduced to writing and which was neglected - for inst:

The Minister of G. promised to receive his salary in Continental money as it was when it became due - this he denied - his parishioners were

offered as witnesses and excluded - but persons  
of the Episcopal society were admitted - he  
being minister of the Presbyterian society

So when there is a Statute which must fail  
of being put into execution for want of wit-  
nesses ~~and~~ interested persons will be admitted  
According to the Stat: of Car 2<sup>d</sup> whoever kills  
fallow. Deer unlawfully shall forfeit £20:  
one moiety to the informer - Jennings v. Har-  
veys - 3 Mod: 114. where the defnd. was con-  
victed by the oath of the informer on the before  
mentioned Stat: - "Is not a material objection  
" to say that the informer shall not be a wit-  
" ness because he hath a moiety of the forfeiture  
" for in cases of the like nature the informer  
" is always a good witness" - In Strange 316  
Domine v. Tilly where the informer was no  
witness on a conviction on the same Statute  
and agreeable to this was a determination of the  
Court



As it respects the Pl<sup>t</sup> and Defend<sup>r</sup> the cases be-  
fore cited do not furnish a complete instance -  
in account they are always good witnesses  
and there appears to be no other instances  
when the Pl<sup>t</sup> and Defend<sup>r</sup> are admitted witnesses  
as in a Court of Law - ~~But in Chancery~~

But in Chancery ordinarily the Defend<sup>r</sup> is a wit-  
ness but the Pl<sup>t</sup> is left called upon by the defend<sup>r</sup>  
is not a witness they are not however witnesses  
in the sense that persons are witnesses at Law  
for it is no contempt of the Court if the Defend<sup>r</sup>  
will not testify as it would not be in a Court of Law  
and the Defend<sup>r</sup> in no case can be ~~compel~~ com-  
pelled to testify - Yet if he does not the Pl<sup>t</sup> state-  
ment in his bill is taken pro confesso with a  
single exception if the thing charged would be  
subject the Defend<sup>r</sup> to a penalty or punishment  
he is excused - yet if the penalty belong to the Pl<sup>t</sup>  
he may waive it in that case the defend<sup>r</sup> must tes-  
tify - This rule extends no further than has been  
mentioned and by no means supposes that the

shall not disclose his own wrong as fraud  
or any other matter that does not subject  
to punishment. for such an idea would defeat  
the Law - If such penalty be barred by Statute  
of Limitation still by a decision of our Courts  
the Defend<sup>t</sup> would not be obliged to disclose - It  
is apprehended however that this is not founded  
upon principle for the penalty being once  
waived whether by Stat: or the party it can  
make no difference -

It seems our Legislature have made very  
wide encroachments upon the Common Law by  
Statutes respecting our book-debt action: in this  
action all the parties are admitted to prove the  
facts charged - It was formerly understood that  
this extended no further than to prove the deli-  
very of the article charged but they are now ad-  
mitted to prove the agreement & this principle  
appears to be calculated to create great injustice  
for Inst: A has a note ag<sup>t</sup> B. for £50: B made  
several payments and takes receipts which are



lost. B afterwards sues A. and recovers the whole sum - then B changes the receipts on book and comes into Court and swears that A owes him so much money - The Court however will not let in proof of a collateral matter as where two are partners and one of them sues on book the Court will not permit the Defend<sup>t</sup> to prove that he owed the Defend<sup>r</sup> debt to both partners &c

In a private assault altho' the Pl<sup>t</sup> is admitted as a witness yet he is not allowed to swear to no more than the single fact of his being assaulted - he cannot swear how much he has been injured by the battery &c

Again we have a singular Statute respecting injuries done to real property - as if trees have been cut the Pl<sup>t</sup> must make it highly probable to the Court that his trees have been cutten - Having done this he must swear that he believes the Defend<sup>t</sup> cut them in consequence ~~of~~ of which the Defend<sup>t</sup> must swear that he did

not or he will be subjected.

So again our Statute enabling a person receiving counterfeit money to recover it back from the person of whom it was received, which appears to be another encroachment upon the Common Law for in this case the party is admitted as a witness to prove the fact of his receiving the money of the Defendant. - The Court in this case are enabled to call upon both parties under oath and search the truth the same as in a Court of Equity.

When the Court arbitrarily makes a person a defendant with others on purpose to exclude him from testifying his ~~name~~ name may by the Court be erased from the record and he admitted as a witness - If there be some proof ag<sup>t</sup> him the not sufficient to convict him his name as before said may be erased or not, as the Court think proper.

Husband and Wife being witnesses -

Husband and wife are excluded from being witnesses for or against each other - and even if all parties



are agreed to such admission the law says not:

The wife however is admitted to testify ~~with her husband~~  
~~know~~ against herself if it does not affect the hus-  
band's interest - I conceive this can happen in no  
case except she have separate property - The real  
ground of this doctrine is to prevent family contentions &

There are however exceptions to this rule - As if  
the husband has been guilty of treason it is said  
she may be admitted, tho' it is doubted by Mor-  
gan whether she could be compelled to testify or  
not - Another exception to the rule is <sup>where</sup> ~~if~~ they  
are parties ag<sup>t</sup>. each other as in a suit to ob-  
tain bonds for good behaviour and this is reci-  
procal - So again where the husband has been  
prosecuted on the part of the publick for an in-  
jury done to her she has been admitted as a wit-  
ness; tho' this is said to oppose the principle of  
the Common Law - A case of this kind is that of <sup>Haw</sup> ~~that~~  
L. Audley reported in Hutton 115. - This case has  
always been reprobated by the Common ~~Law~~ <sup>place</sup>

writers and denied by them as being good Law  
but upon examination one case only has been  
found in which the case of L<sup>d</sup> Audley has ever been  
questioned - This was a case in which Holt was  
judge - The case in Strange is one in which the  
trans wife was admitted and Lord Audley's Case cited as  
33. was not objected to - Subsequent to this is a case  
in Burr's Reports in manuscripts in which L<sup>d</sup>  
Mansfield expressly adverts to the case and says  
that altho' it had been considered as bad law by the  
writers yet he consid<sup>ered</sup> it as good law and not to be  
denied - This case says Mr. Paine I once saw  
reported in a pamphlet -

No other relations are excluded from being wit-  
nesses either by the Common or our Law tho' by  
the Civil Law Children Servants &c are excluded

There appears to be no principle in the  
Common Law that excludes an Attorney from  
being a witness either for or against his Client  
The rule as obtained by our Courts seems to be this



An attorney shall not be a witness for his  
Client ag<sup>t</sup>. the opposite party when it is in proof  
that the attorney introduced or led on to the con-  
versation between him and the defend<sup>t</sup>. respec-  
ting the dispute and about which is about to  
testify - Inst: A. and B. have a controversy - and C.  
A's att<sup>o</sup>. meets B. and enters into conversation  
with him concerning the controversy: C. shall not  
be admitted to testify what B. said: but if B. had  
voluntarily entered into the conversation C. the  
att<sup>o</sup>. would have been a good witness to testify what  
he said - There appears to be no such principle  
in the English Law ~

An att<sup>o</sup>. cannot at Common Law be  
a witness ag<sup>t</sup>. his Client to testify any thing  
communicated to him by his Client and is  
not ~~compellable~~ compellable to testify by the oppo-  
site party to testify ~

A person who is *particeps criminis* is admitted to  
testify as a witness - and there appears to be one

case which oppugns a principle of the Common Law.  
Inst: A. B. & C. have committed an assault of  
~~for~~ upon D. who may sue A. and introduce  
B. and C. as witnesses to prove the fact - and  
if D obtains judgment agt. A. it is conclusive as to B.  
and C. and they are forever discharged from any  
liability - it is clear then that B. and C. are swear-  
ing directly in their own favour being interested  
in the event yet the Courts admit the testimony

### Of Confession -

The Confession of a person has always been  
considered as good evidence in civil causes but when  
<sup>a person</sup> out of Court has confessed himself guilty of a crime  
uncontradicted with other circumstances the jury  
ought not to find him guilty upon such confes-  
sion - yet they cannot be restrained from it.

A confession must not be extorted by threats or  
promises but it must be voluntary in order to  
be improved as evidence - By the English Law  
what a person has said before a Court of enquiry



ny cannot be introduced from any quarter except from the minutes or memorandums which the justice in the lower court ~~take~~ taken down on paper - In this State instead of minutes &c the justice is called in to ~~testify~~ testify to the confession viva voce -

When a person is dead what he has declared under oath is admissible testimony: but what he has said when not under oath is generally inadmissible testimony: for altho' the last man is under oath yet the other was not therefore what he has said cannot come into Court: It is however ~~supposed~~ apprehended that such evidence <sup>in many cases</sup> ought to be admitted for in certain cases it may be the best evidence that the nature of the case will admit of and what the person when living has said cannot otherwise be come at - To this rule there are exceptions - Inst: what a man has said in contemplation of death is admitted as good evidence for in such a situation a man is supposed to

supposed to speak the truth as much as if he were under oath: yet if he did not die his declarations are not admissible.

What a living person has sworn to is not good evidence for the purpose of establishing a fact: but if it be introduced for the purpose of impeaching testimony it is good evidence.

What a witness has said at times when not under oath may always be introduced to impeach or corroborate his testimony - as if a witness has always told one and the same story about a certain transaction and often told it to his neighbours friends &c. afterwards being called upon to testify about the same fact in a Court of Justice - he tells a story totally different: in such case what he had said before he was called as a witness will be good evidence to impeach his testimony and generally such observations made before a person is called upon to testify are more commonly believed than when under oath. So also such declarations may be admitted to corroborate his ~~testimony~~ testimony.



Infamous persons are also excluded from being witnesses by whom are meant those who have been guilty of and convicted of the crime of perjury, any crime punishable by law which betrays a man destitute of integrity: but he must in fact have been ~~convicted~~ convicted of such crime - as if a man has been convicted of the crime of forgery, perjury &c. - But persons may be infamous ~~in~~ in many ways and yet be a good witness till convicted of the crime of perjury.

A person guilty of Barratry has been considered as a crimen falsi: tho' perhaps not so infamous as others - In order to prove a conviction the record of the Court must be produced in other words the witness stands <sup>un</sup>impeached -

Our Courts appear to have made an innovation upon the common Law by letting in testimony notwithstanding the record of the conviction to shew that he has since for a number of years lived an honest and virtuous life. So in England a pardon restores a witness to his former situation and is admitted to testify

It is said this was formerly refused by our Courts - A man convicted of perjury however is an exception to the rule: for by Stat: he is expressly forbidden to testify in any case.

By the English Law all unbelievers except Jews were formerly excluded as witnesses: but now Infidels are admitted and sworn according to their Creed - Quakers are admitted to swear in civil causes tho' not in criminal cases.

Upon English principles a Deist would be excluded were it not for his having partaken of the sacrament: for altho' he has no creed by which he may swear yet under cover of Christianity he is admitted as a witness.

Atheists are expressly excluded.

By our Law there never has been a time when any of these persons were excluded except Atheists. ~~for~~ perhaps this is owing to the form of the N. England Oath - Viz: "By the ever living God" if therefore any person can swear by the ever living God he is a witness on this



ground it is that Atheists are excluded

Excommunicated persons are also excluded  
by the English Common Law - and also  
Popish Recusants - We have nothing of this  
in our Law

## Of the quantum of testimony

One credible witness by the Civil Law is not sufficient to convict a person unless corroborated by other testimony or circumstances. This also is the case in such of the English Courts as have derived their authority from the civil law: but in other Courts no quantum of evidence is by law prescribed - and indeed a man may <sup>be</sup> found guilty and judgment rendered against him without a single witness as in case of a presumption: sometimes a deposition is enough as the case may be and yet a single deposition is not that quantum of evidence which the English Law seems to require when it is speaking of the oath of a credible witness - it however is evidence and

and the Court will weigh it as they think proper —

Hearsay evidence, as a general rule, is inadmissible testimony — yet testimony may be admitted to show what the witnesses testifying have before said on the same subject when under oath — There is however one kind of hearsay evidence which is the proper and only evidence that can be ~~be~~ adduced. It is what others have said of such a persons character as to truth and veracity — for this although learnt from hearsay is the only method of knowing his character — Any other part of a mans character cannot be enquired into let him be ever so vicious —

To again credulous persons cannot be excluded from testifying nor any objection made to them —

In actions of book debt it <sup>may be</sup> asked whether the P<sup>t</sup> is an honest upright man —

It is not generally the practice ~~to~~ to enquire into the character of the parties as if



a malicious prosecution be bro't forward & it is enquired whether the Defend't has been a vicious man and addicted to quarrels &c, Our Courts have made different rules at different times - and formerly it was the practice to enquire whether the Defend't would be guilty of such a transaction &c - but such a practice is now exploded and the enquiry rejected -

Children are always admitted as witnesses tho' no rule has obtained with regard to the age of their swearing - some say 12 - and others 10 - and others 9 years of age to be the proper ages - The practice in this State is, not to put them under oath - if however the Court supposes the Child to be acquainted with the nature of an oath they will swear them, otherwise not -

Witnesses are generally to give no opinion of their own - they are to state the facts and the Court and Jury are to make the inferences but this criterion is not just in every case for the manner in which the fact was done

is many times material and no one can  
well judge as the witnesses

In some cases two witnesses are absolutely  
- necessary these are cases when witnesses only are  
admitted - Inst. In treason ~~2~~ <sup>2</sup> witnesses  
are necessary - but it is said if there be two over  
acts of treason one witness to prove one crime  
another to prove the other will suffice:  
tho' the good sense of this may be questioned

So in case of perjury 2 witnesses are requir-  
ed because when there is only one it is oath  
ag. oath and therefore another must be  
introduced to turn the ballance -

In Connecticut there is a Stat: by which  
every thing is left as at common law except  
in cases when life and death are in danger  
in such case two witnesses are required or  
something tantamount -

By the ancient Common Law the wit-  
nesses on the part of the <sup>criminal</sup> were not sworn



either in treason or felony: But <sup>it</sup> is now made necessary by the Statute of Ann

It has been before mentioned that a person interested in the event of a suit cannot be a witness - to prove him so interested - it <sup>is</sup> first necessary to introduce witnesses directly to prove his interestedness, or secondly if you think you cannot make out such proof you may challenge him upon the Vow in but if you elect one of these methods and fail you cannot resort to the other - and if it appears <sup>to the Court</sup> that such witness is not interested ~~to the Court~~ and he still thinks himself interested he shall be excluded

### Of getting witnesses to Court

This is effected by a subpoena which issues from lawfull authority viz, the Clerk of the Ct or Justice of y<sup>e</sup> P.<sup>e</sup> Ch - To make the witness liable in case he neglects to come to court his

expenses must be tendered - and there is one  
authority which says there must be tender  
to him his travel <sup>to</sup> and from court and  
expenses while there but this last it is pre-  
sumed will be dispensed with for no one can  
tell how much the expense would be - Our  
practice is to tender one day's attendance  
beside the travel - After having done this  
and the witness does not appear or assign  
a reasonable excuse he shall be liable to  
pay all the damages that the party may  
have sustained in consequence of his fail-  
ure - But the rule of damages may be  
uncertain for it may not be known whether  
the witness was a material one or not or it  
may be that the party would have <sup>not</sup> lost his  
case had the witness come: if indeed the  
party ~~can~~ can prove what the witness  
would have said there can be no question  
but if the witness has never told what he  
could say there can be no rule to assess  
damages unless it be presumed that the



witness was a material one and <sup>in</sup> all  
probability would have saved the party from  
loss &c. — In order to lay a foundation for  
the neglect of a witness's not appearing  
the subpoena must be returned into Court and  
the Clerk must there call the witness 3 times  
and then enter the subpoena on ~~record~~  
record —

### Of presumptive proof

Evidence derived from presumption is  
not generally sufficient to warrant a  
judgment — but it is said when there is  
violent presumption it is sufficient evidence  
but however this presumption may perhaps  
be removed by proof —

Interested witnesses are again admitted to tes-  
tify when the necessity of the case requires it of  
this the Courts are judges — and these cases are the  
following — 1<sup>st</sup> where the Stat: would be defeated  
unless an interested witness ~~would~~ could be admitted  
2<sup>d</sup> In an action of account — 3<sup>d</sup> In an action ag<sup>t</sup>

The Sheriff for a voluntary escape the Escaper  
is a witness - 4<sup>th</sup> In an action ag<sup>t</sup> The rescuer  
The rescued may be a witness - 5<sup>th</sup> An agent  
is a good witness to prove ~~his~~ the delivery  
of goods - 6<sup>th</sup> When there are two trespassers, or  
is sued the other is a witness - 7<sup>th</sup> Upon comp<sup>ls</sup>  
to procure bonds for good behaviour the husband  
and wife are witnesses - 8<sup>th</sup> Upon the prosecuti<sup>on</sup>  
of Bastardy the person interested is a wit-  
ness - 9<sup>th</sup> A servant may be impleaded for the  
purpose of charging another in consequence of  
which he discharges himself. These are all said to  
be admitted from the necessity of the thing, for other  
wise proof cannot be had.

There may be added to the above under the law  
of Connecticut 10<sup>th</sup> Our book debt action for  
which see our Statute 11<sup>th</sup> Secret assault - 12<sup>th</sup>  
Our Statute ag<sup>t</sup> Trespassers 13<sup>th</sup> The Statute  
respecting the recovery of counterfeit money  
Of the English mode of proceeding in a Court



Chancery —

When the Defend<sup>t</sup> answers on oath and the Pl<sup>t</sup> introduces a credible witness who contradicts this the matter is sent to a Court of Law to be tried by a jury - in this State this is done by the Court itself —

March: 7<sup>th</sup> 1794

A Lecture of defultory principles on Evidence —

An interested witness may become good by a release from the party "of all demands" — 3 Durs<sup>t</sup> 27. 3 Durs<sup>t</sup> 27

A person becomes interested after the parties have a right to his testimony - if this was done by one of the parties in order to exclude him, he is a witness notwithstanding - Str: 652: 3 Durs<sup>t</sup> 27. 3 Durs<sup>t</sup> 27.

A witness may swear to the fact of an entry made by himself on paper: but if he has no recollection of the fact but from the entry in such case the paper must be produced —

Evidence may be let in to ~~prove~~ prove that there are other considerations to a Deed beside those

expressed in the Deed - This is not however to con-  
tradict the writing but to stand with it 3 Dun: 707.

(Vide) A case there is in Dunf. 707 respecting hear-  
say evidence in which the Court were divided

It: That a witness who absents himself wilfully  
10. may be attached for contempt - Vide Doug: 540

An Exr: where he is Trustee only may be a wit-  
Doug: ness - Doug: 134 -

If the party offers evidence inadmissible  
because not the best evidence the case will admit  
Doug: the Court notwithstanding may look at it  
152 and if it makes <sup>ag.</sup> the party offering it - it shall  
be read - Doug: 752 -

The declaration of a dying person is admissi-  
Burr: ble testimony, tho' no old authorities are to be  
253 found respecting it 3 Burr. 1253 -

We have before seen that if a legacy be given  
to a child and afterwards an advancement  
or portion given to the same child - it is an  
ademption: yet the Courts will let in the



of the parol kind to shew that the parent did not intend the portion should go in satisfaction of the legacy - 2 Brown in Chan: 168.

They will also let in proof to shew that legacies given by a codicil were meant to be accumulative - 2 Brown in Chan: 519: 521.

= It has been a question whether subscribing witnesses can be contradicted by others and determined that they may - 1 Black: Rep: 356.

3 P. Williams 397.

= When there is no Stat: of Limitat: a length of time has been admitted as evidence of the payment of a bond - 20 years for inst: is mentioned as a sufficient length of time to destroy a contract - This goes upon the ground of presumption - which if removed out of the way will let the bond be good - 1 Black: Rep: 532: That a length of time does destroy - There is a case in Dunsford which says the presumption may be removed.

= When the subscribing witness is bail he is compellable

to testify Strange 1106

A persons apprehending himself interested when in fact he is not will be excluded the same as an interested witness. Str: 129

Parol Evidence of the ~~contract~~ contents of a Will is admissible testimony. 1 Dy: 305

See the 2<sup>d</sup> of P. Willi: 136 for the purpose of shewing <sup>how</sup> far Courts have gone in letting in parol proof to shew the intention of the testator and to vary the operation of a writing and indeed the Courts do not adhere to that rule so strictly as ~~many~~ imagined. The Devisor in the case cited gave estate to the right heir of his mother's side forever, and he was heir of certain lands to him from his mother and also of lands from his father.

The question was who should have the Estate the heir of his mother's father or the heir of his mother's mother? and the Court let in proof to shew which



If a deposition of a person not interested and  
before trial he becomes interested his deposi-  
tion cannot be used in his own favour  
1<sup>st</sup> Ray? 1008

An indorsement on a bond rebuts the  
evidence arising from the length of time of  
its being discharged: but as to this there is  
a distinction: if the indorsement be made be-  
fore the Stat. has run upon it, it rebuts the Sta-  
tutory presumption, if it be after, a length of time  
is conclusive - But the National Court has  
adopted a different rule from this, that an  
indorsement never rebuts unless attended  
with actual payment.

Evidence of a single witness corroborated  
by circumstances against the Defendant an-  
swer in Chancery is sufficient to found a  
Decree - 1 Brown Ch: 51.

The verbal declarations of the auctioneer  
at the sale not admissible to contradict

the written ~~conditions~~ conditions. Henry. Black  
207.

The man who has contributed to give  
currency and credit to a writing shall ne-  
ver be admitted as a witness to impeach it  
1 Damp.

There are sundry authorities respecting the  
admission of witnesses interested in the question  
which taken together are inconsistent. Salk.  
203. The Cheat Case as it is called - contradicted  
in Strange 595. Salk: 206 - In the case of  
perjury Buller makes a distinction if the  
prosecution be upon the Stat: the inform-  
er cannot be a witness because he is to have  
£10 - if the prosecution be at Com: Law he  
is a good witness for in such case he has no  
thing - It often happens that general character  
and particular facts may be enquired into tho' con-  
trary to the Gen: Rule - The rule to govern in such cases is  
as follows - "Where a general Character is put in issue



by the pleadings whether it goes fully to a recovery  
defence or only in mitigation of damages - particular  
facts or a general reputation may be enquired into: but  
you are not to furnish evidence to furnish evidence that  
it is probable the thing charged was done - To instance  
in a case of Slander - A sues B. for charging him with  
being a thief - & wishes to prove B to be a vicious  
slandrous malicious fellow - can he do it? - Enquire  
me for what purpose he wishes to make out this  
proof - when he has made it will he be entitled to da-  
mages unless the fact in the declaration be proved?  
it is clear he cannot recover on this evidence, for  
you are not to enquire to furnish evidence that  
the thing charged was likely to have been done:  
but will it entitle him to greater damages than being  
the case after he has proved the charge - not greater  
than he has rec'd. if it had been a man of a better  
character it is not then to affect the damages but  
for another purpose to furnish evidence that he ac-  
tually slandered as charged to render it probable that  
the charge is true it is to come in aid of the evidence  
to induce a belief that P's declaration is not ill founded

for such purpose it is inadmissible and for any  
other purpose it is irrelevant. On the other hand  
B wishes to prove that A stole as charged in  
the declaration - Shall he prove this? I suppose  
sure for what purpose it is wanted, will a proof  
of this fact exonerate B from any damages? It  
certainly will - it is a complete defence and is  
therefore relevant to the Defend<sup>t</sup> and may be proved  
~~but~~ for example - suppose B prove that A stole  
it would not be a complete defence yet it would  
lessen the damages to prove that he stole - in such  
cases it is relevant for altho it does not fully justify  
yet it lessens the damages and ought therefore  
to be proved.

Again suppose he cannot prove any  
particular fact yet A's general character is that of  
a thief - shall B prove it? Will the damages be as  
great the fact being once proved? certainly not it  
therefore is relevant testimony.

The case in the books of the best mistress will it  
be the case in this rule where she preferred her bill for an  
annuity - The Defend<sup>t</sup> was desirous to prove



her character (viz) that she was an immodest  
lewd woman before he took her (for observe it is a  
rule in Chancery that if a woman's character is that  
of an immodest character before ~~such~~ the present  
defendant had the use of her that no recovery can  
be had - but if of a contrary character she is entitled  
to her annuity) This being the case the proof  
which the Defendant was about to make was relevant  
to him and therefore proper to be proved - So  
again the rule is the same in a case of a bill for  
a divorce and also the case in an action bro't by  
the parent ag't the man who debauched his daughter  
Of affirmative testimony

It is a general rule that affirmative testimony is  
considered as superior to negative testimony: but  
there are cases in which the negative must be  
proved because the law in such cases presumes the  
affirmative till the contrary be proved - First:  
where a suit is bro't ag't a person in publick office  
for not doing his duty and he undertakes to deny it

here the negative must be proved, for the law  
presumes the officer to have done his duty till  
the contrary ~~by~~ be proved.

It is also a rule that whatever fact is agreed to  
by the pleadings need not be proved by witnesses  
altho it should turn out in the proof not to be  
true.

So again it is a rule that a person prove  
the substance of the issue but you need not  
prove the issue as it exactly is - if you can prove  
the substance so that it appears you ought to  
recover it is sufficient - as in an action of  
trespass for cutting 10 trees - Plea Not Guilty -  
it is in proof that 2 trees only were cut here the  
proof does not tally with the declaration  
yet there is sufficient to entitle the Pl<sup>t</sup> to a  
recovery - So again in an action on note the  
Defend<sup>t</sup> pleads usury that there was more than  
£6 p.c. removed (viz 20-), the jury find £7 p.c.  
only removed - the issue is substantially found.  
If there be evidence adduced which you



suppose falls short of proving the issue on the part of your antagonist - you can leave it to the jury to determine as is usually the case or if you choose you may demur to it and put it to the Court. To effect this however the evidence must be written or else your antagonist will not be obliged to join in demurrer.

If evidence be offered which you judge comes from a wrong source as an interested witness or if you judge it to be impertinent to the issue you may object to its admission and argue it: if admitted you may file your Bill of exceptions to the opinion of the Court admitting such testimony which must be stated in writing - and if the evidence comes from a wrong source you must state the circumstances of the witness - This bill is signed by the Chief Justice of the Court and entered on record by the Clerk which lays a foundation for a writ of Error.





# Of Bail

In treating of Bail we shall first consider it ~~under~~  
under the Statute ~~and~~ Law of Connecticut, as a  
right understanding of that will lead to an easy  
understanding of the English law and the laws  
of almost all the other States, upon this subject.

Bail as generally treated of by writers applies  
properly to two kinds only - General and Special, but  
in a larger sense it comprehends all kinds of bonds  
where one man has given bail to another to se-  
cure the payment of debts, costs &c of a suit as well  
as bail for the appearance of a person at Court.

In certain cases the Plt. gives bail - and in others  
the Defend<sup>r</sup>, these we shall separately consider.

1<sup>st</sup> of Bail by the def<sup>r</sup>. By the law of this State  
when any person brings forward a suit who in the  
opinion of the Court is not able to pay a bill of cost  
provided the case should go against him or is likely  
to cause trouble to the Defend<sup>r</sup> to get his cost - the  
Court will order him to get obtain a bondsman and  
give bonds for prosecution - It is also the duty of a  
Justice of the Peace to take such bonds <sup>of the</sup> if the Plt is ap-  
parently a bankrupt or unable to pay the cost

tho' this is seldom done — The nature of the bond is that the bondsman acknowledges himself bound in a recognisance to pay costs of suit &c and provided the Def<sup>t</sup> obtains his cause execution must first go ag<sup>t</sup> the Pl<sup>t</sup> and the officer is bound to make diligent search for the property of the Pl<sup>t</sup> and if found he must take it but in the event of his not finding property he is not bound to arrest the body of the Pl<sup>t</sup> and Upon a non est inventus being returned as to the property the bond becomes liable; for should he take the body as he may do according to the tenour of y<sup>e</sup> Execution and the Pl<sup>t</sup> should sue from Court yet the bondsman is not exonerated — as soon therefore as it becomes ascertained that the money cannot be gotten from the Pl<sup>t</sup> the Bond immediately becomes liable and nothing will operate as a discharge but an actual payment of the money by the Pl<sup>t</sup> or bond man —

So in all cases where the Pl<sup>t</sup> issues an attachment he shall give bond whether he be poor ~~with~~ or wealthy — With regard to this a singular practice has obtained which appears to defeat both the intention of the Legislature and the original ideas of thus giving bonds upon attachments — for if the Pl<sup>t</sup> offers himself for a bondsman he is commonly, if not always, taken without any other person and



generally a bond sufficient to answer the Costs only  
This upon reflection & will be seen to answer no  
purpose for the Pl<sup>t</sup>'s bond is no better than an  
execution ag<sup>t</sup> him - The original idea was that  
the Pl<sup>t</sup> had two ways to bring a person into Court  
1<sup>st</sup> by summons - 2<sup>d</sup> by attachment - and says  
the Law if a man will take the rough mode of at-  
taching by which injuries may often be done  
he shall give a bond not to answer the Cost but  
all damages the Def<sup>t</sup> may sustain and as the  
practice now obtains if the bankrupt is worth  
nothing the Def<sup>t</sup> can get nothing for the dam-  
age he may have sustained -

## Of Bonds for Appeal

The party who loses his case in an inferior  
Court always has the liberty of appealing to a  
superior Court - <sup>if of suff. magnitude</sup> and in every case where a man  
appeals he must give bonds to prosecute his appeal  
and the nature of such bond is that <sup>he</sup> is liable to an-  
swer all damages if the appellant does not make  
his plea good -

Ordinarily this bond is liable for nothing  
but the cost but there are cases where the bonds -

is liable for the whole debt and cost - inst: <sup>for cost only</sup> A recovers  
of B. £100 - B. appeals but again loses  $\frac{1}{2}$  of £100. in  
this case if B. cannot pay the costs his bondsman  
is liable: for A has been put to no damage but  
his costs and is in as good a situation as he was  
before for he before had a judg<sup>t</sup> ag<sup>t</sup> B. and that he  
has now and indeed it appears to be the subject of  
all kinds of bail to put the Pl<sup>t</sup> or Def<sup>t</sup> as the case  
may be in as good situation as he was before - It  
however has been a question whether the bondsman  
is liable for the cost that arose after the appeal only  
or for the whole of the cost that has arisen in the  
prosecution of the suit - In practice he is liable  
for the whole Costs -

But there are cases as was before mentioned  
where the bondsman is liable for the whole debt  
costs &c Inst: A sues B. and recovers £100 - B. ap-  
-peals but never prosecutes it letting the matter  
drop there - in such case the bondsman is liable  
to respond all damages - for A has lost all hold  
of the former judg<sup>t</sup> it being the nature of an appeal  
to destroy that jud<sup>t</sup> upon which the appeal is ta-  
-ken



so that execution cannot issue thereon and the  
appellant not having prosecuted his appeal so  
as to give the respondent an opportunity of ob-  
taining another judg<sup>t</sup> he hath no resort but to  
the bond - Out of this arises an important question  
suppose at the time of the appeal the appellant  
was a man of property but at the time the last  
judg<sup>t</sup> is given ag<sup>t</sup> him he has by some means  
become a bankrupt - so that he cannot pay the  
sum adjudged ag<sup>t</sup> him - shall his bondsmen  
be liable - This question is undetermined and  
may occasion a great deal of litigation -

### Of Bail given by the Defend<sup>t</sup>

Bail that is given by the Defend<sup>t</sup> when ar-  
rested is for y<sup>e</sup> purpose of restoring him to his  
liberty - at the same time putting the P<sup>r</sup> in as  
a condition as he was before and is of two kinds -  
1<sup>st</sup> Bail to the officer or Common bail - 2<sup>d</sup> special  
bail or that which is tendered in Court -

First When the officer has arrested the Defend<sup>t</sup> upon  
attachment for the purpose of carrying him to Goal

if the person arrested will procure sufficient bail for his appearance to Court at the time of trial the officer must accept the bail and release the defendant if he does not he will be liable to the Defendant in an action of Trepass - However if the Defendant does not appear at Court it does not of consequence follow that the bondsman is liable - for the action will go by Default agt. the Defendant and execution will issue thereon - And if the Defendant delivers himself up to the officer or is delivered up by the bondsman within the life of the execution the bondsman is not liable for then the Plaintiff is in as good a situation as he was before but if he is not delivered up on the execution or not within the life of it and the officer returns a non est inventus as to his person or body then the bondsman is liable as well for the debt as the Cost.

### Of Special Bail

This differs from the bail just mentioned in the respect only - When the Defendant has been arrested and bail given for his appearance at Court and he in fact does ~~not~~ appear - he then is <sup>in</sup> the case of



the Court who delivers him to the officer to carry him to Goal - he, however being still desirous of keeping his liberty procures bail for his appearance at the rendering judg<sup>t</sup> - as to the proceedings afterwards - his surrendering himself up &c is upon the other bail -

The principles of the English Law are the same only they extend their mercy to the Def<sup>t</sup> much farther for if the Def<sup>t</sup> does not appear before the execution is run out - a *scire fac* is best and if the Defend<sup>t</sup> appears before the judg<sup>t</sup> on that *scire fac* the bondsman is not liable.

The officers return of *Non est* is the criterion of the liability of the bondsman - therefore if this *Non est* be obtained unfairly (inst.) as when the officer seizes the Def<sup>t</sup> when he knows he is gone from home - and the Def<sup>t</sup> appears to have had any hand in it the bond is discharged - so if the officer conducts thus of himself he will be liable.

If the officer takes insufficient bail he is liable and nothing will exonerate him except in one single case - if the man offered as bail is apparently in good circumstances at the time and

afterwards becomes a bankrupt the officer is exonerated

When the officer has taken bail and the Defendant does not appear it is customary for the officer to assign over the bond to the Plaintiff that he may bring his action thereupon and in doing this it is the general practice for the Plaintiff to sue in the name of the officer tho' it is apprehended this is a wrong idea - The mode of recovery upon the bond is by an action of debt or sci: fa: and the rule of damages is the Debt and Cost.

### Of Bonds of replevin

There are still other bonds in the nature of bail where an attachment has issued and property taken it may be released by bond as well as the body of the Defendant.

If the defendant can procure any body of sufficient ability that the property shall be returned he may replevy it - the bond is entered on the writ of replevy which is to respond all damages - and when the property is thus replevied the Plaintiff must issue execution against the defendant and upon a Non est inventus being returned the bondsman is liable.

A question may here arise under this head of



portance - Ins<sup>t</sup>. A gives an attach<sup>t</sup>. of £100. v. B.  
but the officer can find but £90 or any less  
sum even £10 - worth of property which is reple-  
-vied - afterwards the Defend<sup>t</sup>. becomes a bankrupt  
shall the bondsman be liable for the £100 - or the  
less sum only - The terms of our Statute would  
seem to convey the idea that he should be liable for  
the whole £100 but it is apprehended that the gene-  
-ral construction would be that he should pay  
the value of the property only

### Of Bonds on Writs of Error

This also is <sup>in the</sup> nature of bail - Formerly the Stat<sup>t</sup>.  
required no bonds nor indeed does it now but  
only regulates proceedings when bonds are given  
A writ of Error with bonds given is a superse-  
-deas to the former judg<sup>t</sup>. - so if the Pl<sup>t</sup>. in Error ab-  
-sconds in the mean time the bondsman will  
be liable

### Of Bonds on an Audita Querela

The nature of this bond is the same as that upon  
a writ of Error but different in its operation

For Int: A has a debt agt. B. which B has discharged after judg<sup>t</sup>. rendered - A sues out his execution and the officer levies it. B in this case may have his Aud: Due: which must be signed by the judge of the Court. This discharges the Def<sup>t</sup>. from Jail till the sitting of the Court when the Aud: Due: is tried and if found to be true the Defend. gets his damages if not he is liable for costs and in the event of his being unable the bondsman becomes liable.

It may sometimes happen that the Pl<sup>t</sup> may have two bails to secure his cost - Int: A an officer at the suit of B. arrests C. and D. being present gives bail for his appearance at Court - C appears at Court and D. to give special bail for him - he loses in the case and appeals to a higher Court and procures E. to become his bondsman to prosecute the appeal - the appeal is not prosecuted - E. becomes liable for the whole debt and cost on B. may release E. as to the cost and come upon D. for no security given to prosecute an appeal shall exonerate the special bail in the case.

### Of the English Law of Bail

When a person is arrested under the English Law and



bail given for his appearance the persons giving bail has such power over the person arrested that he may take him and him imprison provided he is about to make his escape - In order to do this with safety the bail thus taken is entered on a piece of paper cut for that purpose called the bail piece - This the bondsmen may carry in his pocket which furnishes complete evidence of his being bail for the prisoner and when he is about to escape he may take him - It is not however absolutely necessary that the bondsmen have this bail piece to authorize him to arrest the prisoner but to avoid a rescue which may often happen when the bondsmen cannot shew his authority - The practice of a bail piece does not obtain in this State tho' we have a certificate from the Clerk of the Court which answers the same purpose -

Should the bondsmen proceed to apprehend the prisoner without shewing this kind of authority a rescue might be justified -

This Bail in all countries is applicable to mesne process only except in certain cases under the English Law a practice has obtained in B. B. of granting bail where writs of Error are depending - Ordinarily speaking bail is to be taken by the officer

but a practice has obtained in the English law of a man being bailed by the judge before suit commenced: about this ~~law~~ however the authorities are contradictory yet thus far the authorities are agreed if the Def. is apprehensive that he is about to be sued, he or the Pl. may agree to go before the judge and there enter bail for his appearance and this is accounted good and valid in law. It is said that the Def. may do this of himself without the Pl. but as to this the authorities do not agree.

The officer in all cases must take bail if a sufficient bail be offered him and it is not at his option to refuse or not as he pleases, if however he should refuse he subjects himself to an action. The form of this action has been a matter of much dispute - whether trespass vi et armis or trespass on the case was the proper action - The English Courts have determined the action on the case to be the only proper one  
Cro. Car: 196 - 2 Saund: 39 - Vent: 55: D5: 2 Ray? 425  
Salk. 99

The Sup. Court in this State sustained an action vi et armis ag. the officer but the judgment



was reversed by the Court of Errors —

This bail bond is assignable over by the officer to the creditor and he must take it provided it be sufficient to respond his damages: but should he doubt of its sufficiency and refuse to take it in consequence of which he should bring his action ag<sup>t</sup> the officer it is apprehended he would get defeated in case the bond should turn out to be sufficient otherwise the officer would be liable.

The mode of proceeding under the English Law is, if the creditor dishes the bail bond he moves the Court to have the body ~~det~~ <sup>not</sup> in them the Court will amerce the officer for a sum in damages; but all proceedings are stayed upon this amercement till the officer can have time to pursue his remedy ag<sup>t</sup> the Bail and recover after which the money is bro<sup>t</sup> into Court and the amercement taken off.

Now there is a difference between our and the English Law — The Sheriff is not amerced here but if the bond is insufficient he must answer in an action to the party.

Under the English Law there are two kinds of bail — Common and Special. The first is only a matter of form — In <sup>o</sup> Doe and The <sup>o</sup> Roe

Str:  
423  
1 Vend  
Q3:  
1: Huc  
399

being fictitious persons substituted instead of real ones - Special bail is a real bond - a process issued and the Sheriff ~~is not to~~ returns that he has taken suff. bail - the only difficulty attending this subject is to understand in what cases Comm. bail will answer and in what cases special bail is required - In all cases of debt where the sum demanded exceeds £10 special is required - if the sum be under £10 the body cannot be held to special bail. It is easy to see then that special bail may always be required for a man may easily make his demand exceed the sum of £10 - to prevent which the law obliged the P<sup>r</sup>. to make affidavit to his demand. So that the officer may know when and where not to take the different kinds of bail -

In all other cases when the action is only in damages as a general rule Comm. Bail answers but the Courts in many instances will order special bail where the demand is not a sum certain as where it is it is apparent from the transaction itself that more than £10 is due; as in case of an



outrageous assault &c. - In the case of Slender  
however bail is never required - That special bail  
may be required in certain cases where the action  
sounds in damages - See the following authorities  
§. 207. 276. Rolle 335; Lev. 39

No special bail is required in actions on penal  
Statutes - neither is an Ex. or Hic holden to bail  
except in one case, where a devastavit is replied  
for then the judg. is de bonis propriis this may be  
done in this State when the action is by a Legatee and  
no reason can be given why special bail should not  
be required upon a Sci. fa. agt. the Ex. - So again  
where a process issues agt. husband and wife both  
must be attached or indeed the wife cannot be  
attached and holden without her husband: yet  
if the wife be attached common bail may be given  
and the suit still go on but the wife cannot be im-  
prisoned without the husband and should this be  
the case the Goaler is not warranted to detain her.

### Of the proceedings agt. Bail

The proceedings under the English Law are the same

as in this State: but as has been mentioned  
the Eng: Courts extend their favour to the Def:  
farther than is done in this State - When a non-  
est is returned a *seire: fac: issues* and if the D. f.  
will surrender himself up upon the return of *seire:  
facias* the bond is discharged - farther if a non-est  
be returned upon a *seir. fa* and a second issue  
with a like return - still a surrender of the pris-  
oner will discharge the bail

The death of the principal before a non-est be  
returned it will be a sufficient excuse for the bail  
both in Eng: and this State and altho' under  
the Eng: law the principal may be surrendered  
up after a *seir: fac:* yet if he die after a non-est  
the bail is not discharged

If the ~~Lit. Pl.~~ *Verdict* commits to file his declaration  
within two terms the bail is discharged.

If the Sheriff takes a bond sufficient at the time  
Barnes but becomes a bankrupt before return & it seem  
Notes by the Eng: Law that the officer is still liable for  
90 insufficient bail, but in this State he is dis-  
charged



In case of a judgt. Where bail is taken in  
B. R. it is for what shall be recovered in

C. B. for a certain sum.

In case of a judgt. for the debt and that judgt.  
reversed it has been a question whether the  
special bail is discharged - On the one hand  
it said if the bail is once discharged it is al-  
ways discharged - On the other hand it said  
there never was a judgt. legally: for it has been  
reversed and with this idea the authorities seem  
to concur Cro. Jac: 95: Moor 850

### Of the Defence of Bail

1. It is a defence for the bail that the prisoner sur-  
rendered himself up in the life of execution -  
2. That he was taken in execution - 3. That  
no execution had ever issued agt. the principal  
If judgt. be obtained agt. the principal and then  
against the bail the Wt. takes out execution agt.  
which he pleases Cro. Jac: 320

Where there are ~~one~~ several bails they are  
joint and several - 7. Lev: 226

If he sues out execution agt. the bail any gets

no satisfaction he may still resort to the  
Principal (Co. Jac: 549. 1 Sid: 107. 1 Vent: 315  
But if he has once taken the Principal  
the bail is discharged for it supposed that  
the body answers the purposes of Law



# Of the legal procedure and the Jurisdiction of the several Courts in Connecticut

In the State of Connecticut there are several Courts for the purpose of trying causes at law and punishing offenders, with very different ~~jurisdictions~~ jurisdictions. A Justice of the peace has jurisdiction to try all civil demands which come before him as a Court of Law where the matter in demand does not exceed £4. except where the title of Land is concerned - to the trial of which his jurisdiction does not extend. Securities for money and Wills of credit vouched with two witnesses are cognizable by him where the matter in demand does not exceed £10. Whenever an officer receives a writ upon mesne process or a writ of Execution returnable to a Justice and shall not execute the same or make a false or undue return: for every such neglect or misfeasance the officer is suable before the

Justice to whom such writ or execution was returnable, altho' the Damages demanded exceed the sum of £4. — Justices are empowered to take confessions of Debtors to the amount of £20 and this is not to be understood with Costs inclusive.

The judgment of a Justice is final in a suit brought on a security for money or Bills of credit vouched by 2 witnesses and in which the matter in demand does not exceed £10. Likewise on a former judgment of a Justice if it does not exceed £10. — No Officer's receipt for an Execution pursuing the Statute mode of suit except where the judgment on which the Execution issued was by confession of the Debtor for more than £20.

In all other cases within the jurisdiction of a Justice where the sum demanded exceeds 40s. there is an appeal to the next County Court which appeal may be taken from a judgment on a plea of abatement or demurrer as well as the merits of the case.

If the Defendant pleads title in an action of trespass before a Justice he cannot try it but must bind the Defendant in a Bond not exceeding £20 to prosecute his plea and bring forward a suit for the trial of his title at the next County Court.



Justices have no cognizance in a matter of Equity  
neither can they grant a new trial. All actions  
before a Justice must be brought in a town where  
one of the parties lives. When a Justice renders a  
judgment for more than £4 including cost yet  
a *scire facias* may be brought against the Bail  
to recover the value of the judgment before the same  
Justice. In all matters cognizable by a Justice  
he has exclusive jurisdiction except when an of-  
ficer is sued for not executing or making a false  
return of a writ, returnable before a Justice de-  
manding more than £4 damages in which case  
the County Court have a concurrent jurisdiction  
with the Justice before whom it was returnable.  
As there is no provision made by Law for Justices  
to appoint Auditors it may be a question whe-  
ther they have any jurisdiction in matters of ac-  
count and also whether they have a power to  
try a *Scire facias* against a Garnishee. but  
universal practice is in favour of their jurisdic-  
tion in both cases. Neither is there any pro-  
vision made for giving bonds upon an appeal  
from a Justice: but it is the universal practice  
to require bonds. A Justice's jurisdiction to try  
Civil—

cases does not extend beyond the limits of his own town where there is authority in the town where the cause is to be tried proper to try the same

## Of the Court of Common Pleas

The Court of Common Pleas have cognizance of actions except those mentioned and a few others of a particular complexion in which the Sup<sup>r</sup>. Court have jurisdiction - All actions where the matter in demand does not exceed £20 where the title of Land is not concerned and all actions on Bonds or Notes for the payment of money only and bills of Credit vouched by two witnesses unless when a justice has exclusive jurisdiction are heard & finally determined by the Court of Common Pleas - Wherever an officer is sued in account for an Execution the judg<sup>t</sup> of the Court of Common Pleas is final - And in all actions of account where Auditors have been appointed who have set and made their report the judg<sup>t</sup> of this Court is final - The same rule obtains in



Book debts after the return of Auditors: Likewise  
when the matter in controversy has been submit-  
ted to arbitrators by rule of Court: The judg<sup>t</sup>. of the  
Court on their return is final. A judgment of  
the Court of Common Pleas in an action bro't  
on a receipt of a 3<sup>d</sup> person for goods taken on an  
execution and delivered to be redelivered at the  
time of sale shall be final. This Court has  
an exclusive jurisdiction of all matters in Equi-  
ty from the smallest matter to £100. In all  
other matters cognizable by this Court there lies  
an appeal to the next Sup<sup>r</sup>. Court and the judg<sup>t</sup>.  
of the Sup<sup>r</sup>. Court is final in all matters which  
come before them by appeal. Whenever an  
action is bro't ag<sup>t</sup>. an officer in the Sup<sup>r</sup>. Court  
for not executing a writ returnable there or  
for making a false or untrue return their ju-  
isdiction is original and judg<sup>t</sup>. final, now  
speaking of the

## Superior Court

This Court has also an orig<sup>l</sup>. and final juris-

- diction where a Scire Facias is issued upon a  
judg<sup>t</sup>. rendered by them - This Court hears &  
determines all writs of Error from the judg<sup>t</sup>. of  
Justices and the Court of Com: Pleas - They  
have power to grant Bills of Divorce in cer-  
tain cases - They have the exclusive cognizance  
of cases in Chancery from the sum of £100  
to £1600 - Writs of Error may be brought  
upon proceedings in Equity as well as Law  
It is the peculiar province of this Court to issue  
writs of Mandamus: Prohibition and Habeas  
Corpus - Of the Jury

All issues joined on a matter of fact in the  
Court of Common Pl: or the Sup<sup>r</sup>. Court shall  
be tried by a jury except by agreement the  
parties put themselves on the Court for trial

#### Of a Default

Upon a Default the Clerk of the Court makes  
up the damages (or as it is termed "to be heard in da-  
mages") they will do it - Likewise on a Demurrer  
judgment is in Chief - yet if it be requested the Court



will hear the parties in Damages -

Upon the forfeiture of a Bond the Court will hammer down the penalty to the principal, interest and costs - So upon a bond with condition that may be broken at several different times and a writ is brought for the first breach the Court will render judgment for what is then Equity due and lodge the Bond with the Clerk of the Court and upon a subsequent breach the obligee may have a Scire facias to cite in the obligor to show reason why judgment should not be rendered for a future breach -

In trials in Chancery the Court may enquire into the facts themselves by a Committee -

### Of the Supreme Court of Errors

This Court has no original jurisdiction but are constituted solely for the purpose of trying writs in Error brought before them from the Sup. Court -

### Of Courts of Probate

This State is divided into districts in each of

which there is a Court of Probate consisting of one Judge who has the cognizance of the probate of Wills, of granting administration, appointing Guardians and acting in all testamentary matters. From this Court there lies an appeal ~~from~~ to the next Sup<sup>r</sup> Court.

### Of the Gen<sup>l</sup>. Assembly

The Gen<sup>l</sup>. Assembly of this State is a Court for the purpose of trying all suits brought ag<sup>t</sup>. the State by an individual. It is also a Court of Chancery for determining all matters in Equity which exceed £1600. And in all these Courts they appoint their own Clerks except Justices who have none. The Gen<sup>l</sup>. Assembly grant Divorces for reasons for which the Sup<sup>r</sup> Court cannot.

### Of Process

The ordinary process in civil actions is Summons or Attachment. These if returnable before a Justice may be signed by a Justice unless the



debt be sued to answer out of the County in which he resides in such case it must be signed by an Assistant or judge of the County or Sup. Court or by the Governor Deputy Governor of the State: unless it be a Scire facias which may be signed by a Justice of the Peace. Writs returnable before the County Court may be signed by a Justice of the Peace or Clerk of the Court unless the Defend<sup>t</sup> be sued to answer out of the County in which case they must be signed by an Assistant & as in case of a summons unless it be a Scire facias which must be signed by the Clerk or an Audita Querela which must be signed by the ~~Chief~~ Chief Justice of the County Court — The Judges of the County Court can only sign writs returnable before themselves and Justice of the Peace Writs returnable before the Sup. Court may be signed by a Justice unless the Defend<sup>t</sup> be summoned to answer out of the County in which he resides, in which case it must be signed

by an *Assistent* & as in case of a summons  
also in case of a *Dei facias* which must be sig-  
ned by the Clerk of the Court to which it is made  
returnable in all cases - yet if it be a writ of  
Error it must be signed by one of the Judges of  
the Sup<sup>r</sup> Court - if an *Audita Querela* by the  
Chief Judge - Writs returnable before the  
Supreme Court of Errors must be signed by one  
of the Judges of that Court

### Of Service

When one is sued by summons the writ must  
be served by reading it in the hearing of the  
Defend<sup>t</sup> or by leaving a true and attested copy  
at the Defend<sup>t</sup>'s last usual place of abode: but  
if sued by attachment it must be served on  
the Quarters of the Defend<sup>t</sup> and for want thereof  
on his lands or body and by reading it in  
his hearing or by leaving a true and attested  
copy at the last usual place of his abode - When  
served on the person the body is held in custody  
to respond judgt. and when the body is attached



and final judgment under Execution must  
issue and be levied on the body within five  
days after the rising of the Court - When per-  
sonal property is attached it is holden 4 months  
If the Estate be attached the officer must  
leave a true Copy of the attachment with the  
(Defend<sup>t</sup>) or at his last usual place of abode  
with his return thereon describing the Estate.  
If it be real Estate he must also leave a copy  
with the Register of the town where the land  
lies with a description thereof within seven  
days after the attachment and before the expi-  
ration of the time limited by Law for the ser-  
vice of Writs.

### Of Factors Agents or Attornies

When a person is sued who is not an inha-  
bitant of this State it is good service to leave  
a copy with his attorney: In case Estate is  
attached and the (Defend<sup>t</sup>) has no attorney  
in this State any reasonable notice to him  
of the suit is sufficient.

When a suit is brot against a person not an inhabitant of this State a copy of the writ being left with any person having in his hands the debtors property or of him who owes the debt as Attorney and Trustee shall be good service and not only so but it shall be a lien on all the estate of the debtor in such persons possession or on debts due to the debtor - And after the judgment agt. the debtor is had and non est ~~as~~ as to the Estate is returned on the Execution - a Scire-facias shall issue agt. such Attorney or Trustee and a recovery be had agt. him - & Bonis ~~pro~~ propriis to the amount of the debt if the Attorney has so much in his hands and in that case the trustee is called upon as a witness to answer upon oath what effects of the Debtor he had in his hands

### Of service on a Community

It is a sufficient service to leave a copy of the writ with the Clerk of the Community or a Committee or if it be a township, a Selectman

### Of joint Debtors

Whenever there are joint debtors and any one



of them does not reside within this State the service of the writ on him or them who are in the State shall be sufficient - and in case the absent debtor shall suppose himself injured by the judgment rendered after such service he may obtain relief by Audita Querela.

### Of Limitation of Notice

When a writ is returnable before a Justice service must be made six days before trial the day of trial inclusive - When returnable before any other Court service must be made twelve days before the trial including the day of trial - Where service is made on an attorney or trustee there must be 14 days notice whether the writ be returnable before a Justice or other Court - The same rule obtains when an officer is sued for not executing or making a false return.

### Of Bonds for Prosecution

When a summons is issued out if the Pt. live out of the State he must procure a bondsman for prosecution and whenever it shall appear to the signing au

thougt that the Pl<sup>t</sup> altho' he be an inhabitant of  
this State has not sufficient Estate to respond to  
Bill of cost which may be recovered against him  
he ought to require the Pl<sup>t</sup> to procure a bondsman  
to prosecute. And in any other stage of the  
proceedings the Court may order the Pl<sup>t</sup> to find  
pledges for prosecution. Whenever an attach-  
ment is prayed out a bond to prosecute must  
be given — Of entering Bail

Whenever the body in taken of the Defend<sup>t</sup> is at-  
tached the officer shall take bail for his appear-  
-ance at Court if sufficient bail be offered or pro-  
-cured — if no bail be offered or procured the offi-  
-cer must keep his body in custody and have him  
in Court — Whenever he enters special Bail or as  
the English Law terms it "Bail to the action"  
he is again at liberty — If no special bail be en-  
-tered he is to be committed to Goal and if he  
pleads he must plead in custody — Whenever  
a judg<sup>t</sup> is rendered by a Justice or the County  
Court and an appeal is moved for: bonds to  
prosecute the appeal are required — Where  
personal property is taken a replevin may



may be issued to restore the property to the def.<sup>t</sup>  
upon his procuring sufficient bonds to an-  
swer all damages which the Pl.<sup>t</sup> may recover  
ag<sup>t</sup> the Defend<sup>t</sup>. When and after a writ is  
served it must be returned to the Court to which  
it is made returnable. When an appeal is  
taken it must be entered in the docket of the  
Clerk of the Court before the 2<sup>d</sup> opening of the  
Court. Of Pleas and Pleadings and  
1<sup>st</sup> of Abatement

When a suit is brought to a Court and the  
proceedings are commenced if the Court  
has not cognizance of the case a plea to the  
jurisdiction of the Court is the proper plea.  
This is what is called, improperly, a plea of  
abatement tho' we commonly term it such  
and plead it in that manner. When it is  
found that the Court have cognizance of the  
matter the next plea in order is a plea in  
abatement. A plea in abatement is, <sup>the</sup> af-  
signing reasons <sup>by</sup> the def.<sup>t</sup> why he should

not answer to the Pl<sup>t</sup>'s writ. It may be for  
some defect in the writ or irregular  
by or deficiency or it may be for some requi-  
site to obtain a writ: as not paying the duty  
as by law required or for an alteration in the  
Pl<sup>t</sup>'s circumstances since the date of the writ:  
as when a feme sole sues and afterwards mar-  
ries - This is a dilatory plea and if the Pl<sup>t</sup>  
succeeds the judg<sup>t</sup> is respondens vester.

If the judgment be that ~~it is abated~~  
the writ does abate the Pl<sup>t</sup> may commence a  
new suit. But when the Defend<sup>t</sup> pleads a  
fact on which issue is taken and the jury try  
the judgment is in Chief - It is a rule in abate-  
ments that when a plea of abatement is pleaded  
it must be so pleaded as to enable the Pl<sup>t</sup> to have  
a true writ <sup>in this state</sup> a writ and declaration both go  
out together to be served on the Defend<sup>t</sup>. We con-  
fused the terms thinking them to be synoni-  
mous yet ~~they~~ they do not mean the same  
thing - The writ properly speaking is that



part ~~could~~ addressed to the officer commanding &  
and continues until the action is named - then  
begins the Declaration - The date is applied to both  
the signing and the duty of the writ - For any fault  
in the declaration a plea of abatement is not proper  
but a Demurrer either general or special as the case  
may be yet it is very common to plead by way  
of Abatement for a demurrable fault - so that if  
the plea proves insufficient there may be a  
respondens ouster instead of a judgment in  
Chief - a custom which encourages dilatory pleas  
and cannot be justified upon legal principles

There lies an appeal from the just. of a Justice  
or the County Court upon a plea of abatement if  
the case be ~~applicable~~ appealable and it be a ques-  
tion of Law to be tried and Error lies - When  
the Defend<sup>r</sup> pleads in abatement and appeals and  
again in the upper Court pleads an abatement  
(for he may upon such removal charge his plea)  
and judg<sup>t</sup> of respondens ouster is again given ag<sup>t</sup>  
him - Execution shall issue for that case altho he  
recover on the merits - It is usual in petitions

in Chancery and for new trials to plead by way  
of abatement matters that go not only to the  
form but <sup>also</sup> to the substance ~~also~~ of the petition  
That which could be a general demurrer to a decla-  
ration is an abatement to a petition —

When a plea of abatement is found sufficient  
the Plt. shall have liberty to amend if the defect  
be in its own nature amendable — as in case of a  
misnomer in respect to the place of residence —  
Amendments may <sup>not</sup> be made when the matters  
to be amended are contrary to real truth — as if a  
service of a writ appears by the endorsement to be  
on Friday the day after the time of service is ex-  
pired — yet in fact if it was the day precedent it  
shall be merited — but if it was served after the  
time no amendment shall take place — Amend-  
ments shall never be allowed without paying  
costs —

## Of Demurrer

When we find that the action is brought before  
the proper forum and that there is no cause  
of ~~action~~ abatement we then attend to the



Declaration and if we find it deficient in point of form only we take advantage of it by special demurrer which is particularly signifying why it is deficient. A Demurrer admits as true the facts as laid in the Declaration but contends not withstanding these facts <sup>that</sup> there is no ground for a recovery. In many cases the Demurrer goes only to the Declaration which shows there ought to be no recovery where something is omitted which if stated would be a sufficient ground if true - as when an action is brought in which the Law requires that notice should have been given of a service performed or a debt due before an action could be maintained - here the omission of notice would be ground for a Demurrer - for tho' indeed notice may have been given and there is a ground of action yet both these ought to appear to the Court. Upon such declaration being defeated a new action may be brought and the deficiency supported - at other times the demurrer goes to the

action (viz) When the pretended cause of action is such an one as is not recognized by law as a cause of action in this case no declaration can be drawn consistently with the truth of facts which can possibly be supported - And a Demurrer is not only that particular action but a judgment. It will be a bar to any subsequent action for the same cause: as if an action be brought upon a charge of lying - as such a charge is not actionable no declaration thereon can be supported.

Where the Demurrer should be special and where general it is difficult to give a rule. Our practice is so loose in this respect that no very clear distinction can be made - I should suppose that a general Demurrer ought to be confined to what I have called a demurrer to the action and that all demurrers merely to the Declaration should be special - This I mention as what would be a good general rule but not what in fact takes place either in the English or our Courts - so if



may continue to draw the line that in all cases where the demurrer goes to the action it is general but where there is a demurrer for some defect which is only an informality it must be special - For other defects of a more considerable nature as not alledging a consideration in assumpsit which if alledged would make a good declaration the common practice is to demurr generally - The judgment on the Demurrer is in Chief A Demurrer may be taken in any stage of the proceedings as well as in the Declaration - If to a plea it admits the truth of the facts but contends that it is no legal defence - So to replies, rejoinders &c.

### Of pleas to the Action

When the action is brought before the proper tribunal and can neither be abated nor defeated by demurrer the Defendant may plead a plea in bar or the general issue as the case demands - The general issue may be said to be a total denial of the facts alledged in the

in the declaration as Not guilty in Trespass  
Nil debet in Debt - and under this issue we  
are permitted by Statute to give any thing or  
almost every thing in evidence - as justifica-  
tion in Slander &c. Indeed there is nothing re-  
quired to be pleaded by our Statute excepting  
where the Defend<sup>t</sup> is saved by the act of 4<sup>th</sup> Ed.  
as a Release &c which must be pleaded specially  
and in some cases where we may give the spe-  
cial matter in evidence it is common to  
plead specially - and in some cases the prac-  
tice of pleading specially has been so uniform  
that I ~~do~~ doubt whether the Court would  
permit the special matter to be given in evi-  
dence tho' ~~seemingly~~ seemingly warranted  
Statute as Usury &c.

### Of a plea in Barr

A plea in barr is an answer to the 1<sup>st</sup> charge in the Declaration which admits a  
in the case of a Demurrer the truth of the fact  
alleged but assigns some new matter not ap-  
pearing upon the Declaration as a reason why



the Plt. should not recover as in Debt or Bond  
the Defend<sup>t</sup>. admits that he gave the bond were  
it not that he already made full payment of  
it which he pleads specially in bar. When this  
reason is assigned be it what it may the Plt.  
must answer it which is called a replication  
this may be either by Demurrer which admits  
the truth of the plea but denies the sufficiency  
of it in Law to overthrow the Plt's claim  
as if a debtor in a suit on a Note should plead  
that it was usurious and in no part of his plea  
alleges a corrupt agreement the Plt. would demur  
for want of that allegation which would bring  
the question before the Court to determine whether  
such allegation or not - or it may be by traverse  
of the facts alleged in the plea which is a denial  
of the truth of facts and bring the question of the  
facts to the trial of the jury as when the Defend<sup>t</sup>.  
pleads infancy; this is traversed - Infancy or not  
Infancy is the question to be tried - or the Plt's an-  
swer may be an admission of the facts stated in the  
plea at the same time assigning some reason not  
incongruous with the declaration and which does

not appear in the declaration or plea why the  
Def<sup>t</sup> Pl<sup>t</sup> ought not to avail himself of the matter  
alleged in the plea: as where the Defend<sup>t</sup> pleads  
in bar his Infancy the Pl<sup>t</sup> admits his infancy  
but says that it is an insufficient bar to  
cave because he says the Debt alleged in the decla-  
ration was for necessities which the Defend<sup>t</sup> has  
of the Pl<sup>t</sup> - to this replication the Defend<sup>t</sup> must  
answer by Demurrer or Traverse: as rejoining  
some new matter which has not appeared before  
in the course of the pleadings and so on till some  
issue in fact or law is joined between the parties.  
Whenever the issue is joined on a demurrer  
the Demurrer pervades all the pleadings and goes  
back to the first defect - as if an action were brought  
on an assumpsit and the declaration stated in  
consideration and the defend<sup>t</sup> pleads such a plea  
the Pl<sup>t</sup> thinks a sufficient defence he therefore  
demurs to it and it is found an ill plea: yet  
it is good enough for the Pl<sup>t</sup>'s declaration when  
the Demurrer reaches. Whenever the declaration  
counts upon some writing and does not recite  
the writing but counts upon it according to



what the Pl<sup>t</sup> considers to be the operation of the Law and the Defend<sup>t</sup> conceives it to be directly contrary and wishes to bring the question of Law properly before the Court he will pray over of the writing and recite it verbatim and having then made it parcel of the record will demur for it now becomes the same thing as if the Pl<sup>t</sup> had recited it at large which if he had done the Defend<sup>t</sup> according to his conception of the Law would have demurred to the declaration. Whenever an issue of fact is joined to the Country if the evidence admitted to support the fact be such as in the opinion of the opposite party is not suff<sup>t</sup> in Law he may demur to the evidence. This is done by stating exactly all that was testified at the trial in writing and if true the opposite party must join - the question is then before the Court whether the evidence be sufficient or not - there is no contention what the evidence is - this is all agreed to by the Demurrer except the legal operation of it. It is frequently litigated in the course of trials whether the

witnesses adduced be legal and also whether the matter offered be pertinent to the issue

The first may happen when it is contended that he is interested - The last may be exemplified in this manner - where ~~of~~ injury is pleaded and the (Defend<sup>t</sup>) knows that it cannot be proved and offers evidence of another kind - Whenever therefore the Court admits, as you suppose an improper witness or suffers improper ~~to~~ matters to be given in ~~the~~ ~~any~~ evidence you may file a Bill of exceptions stating the whole matter as it appears before the Court which the judge must certify to be true - This lays a foundation for a writ of Error in which writ the same question if they reverse it is tried before the upper Court as in the lower Court - If the upper Court affirms the judg<sup>t</sup> of the lower Court there is an end of the matter

### Motions in Arrest

A motion in arrest of the judgment may be



made after Verdict for the insufficiency of the declaration, plea, replication &c - as suppose in an action of Slander the Charge be for calling the Pl<sup>r</sup> a liar - the Defend<sup>t</sup> pleads not guilty - Verdict Guilty - the Defend<sup>r</sup> moves in arrest of Judg<sup>t</sup> for that no suit is maintainable for such a charge - Judg<sup>t</sup> is arrested - So when the Defend<sup>t</sup> pleads an usurious contract and omits the words ~~corrupt~~ agreement which is an essential requisite of Usury - tho' the Jury find in the words of the plea that it was usurious - yet Judg<sup>t</sup> shall be arrested and in this case a repleader will be ordered: but if it be for a deficiency in the Declaration if there was no good ground for a suit then no repleader ought to be ordered for this puts an end to the business. Many defects which would have been fatal on demurrer are aided by Verdict and cannot be taken advantage of in arrest of Judg<sup>t</sup>.

If upon reviving the declaration something is omitted which if it had been alledged would

have rendered it sufficient - it shall be presumed  
that it was proved to the jury otherwise they would  
not have given a Verdict for the Plaintiff, since it was  
necessary to be proved in order to entitle him to a  
recovery such omission is aided - as suppose a  
declaration in assumpsit where the Law requires no-  
tice to be given and notice is omitted in the decla-  
ration. There is good cause of demurrer - but on a  
motion in arrest it shall be presumed that notice  
was proved to the jury or there would not have  
been a Verdict for the Plaintiff - But if it appears  
from the Declaration that there could not be ground  
for a recovery that no supportable allegation  
could be inserted which would render it a good  
one the Verdict does not aid - as where a man is  
sued for calling one a liar - Where there is a mo-  
tion in arrest foundation is laid for Error - It  
would seem at such view that the rule did not  
obtain respecting a Verdict aiding a plea in bar  
or other subsequent proceedings - as in case of a de-  
claration on contract - If a plea of Usury be



pleaded and no corrupt agreement alledged altho' the jury find in the words of the plea that the contract was usurious yet the want of the term "corrupt agreement" is not aided by the Verdict

It would seem that by finding Usury they had found the ~~of~~ corruption as in the case before just when they had found the ~~of~~ usumpsit they had found the notice also but in that case as notice is necessary to constitute the usumpsit it is fair to conclude that when they had found the usumpsit that they also found the notice — Whenever there is a Verdict upon a special plea they do not find general but undertake to find specially the whole matter therefore when they find that as being the whole matter and all the particulars of which they can find do not mention corrupt agreement it is not fair to presume that they have found any corruption — But had the jury inserted in their Verdict corrupt agreement as they might have done the plea would have been aided

By our practice there may be many things  
shows the record which are reasons for annulling  
the judgment - as misbehavior in the jury, a  
plain mistake in casting or footing an account  
improper writings being delivered to them in  
Court &c.

After a final trial before the County or Superior  
Court petitions for new trials are very common.

The reasons for granting new trials are mis-  
~~conduct~~ pleading: as where a person has de-  
murred when he ought to have plead the gen-  
issue - Another reason is for the discovery of  
new testimony which is material evidence in the  
case - in this case the names of the witnesses must  
be inserted in the petition and the substance  
what they will testify or the petition will not  
if it be inserted the Court will hear the witness-  
es and if reasonable will grant a new trial  
and whenever the petition is granted the  
first judgment is vacated - A petition for a new  
trial before it is granted is no supersedeas to an



execution on the first trial altho' the evidence  
be new: yet if the petitioner knew of it before  
and might have had it at the former trial  
it is no reason for granting a new trial: And  
if a witness improved at a former trial now  
undertakes to remember more than he testified  
it is no reason for granting the petition.  
A third ground for a new trial is excessive  
damages - this scarcely ever prevails it being  
a rule that the Court will never grant a new-  
trial for excessive damages unless they are  
normous and flagrantly excessive and such  
as raise a strong presumption of partiality  
in the jury - there are however no exceptions to  
this rule - When the damages arise from con-  
tract it is not necessary that this presumption  
take place but it is discretionary with the Courts  
in any excess of damages -  
A fourth ground is the smallness of damages  
this very seldom prevails and is in much the  
same situation as the last - The Courts have

in some instances granted new trials because the  
Verdict was ag<sup>t</sup> Law: but I believe they do not use  
it as a ground for a new trial.

A fifth ground that the Verdict is ag<sup>t</sup> evidence  
but this is not to be understood when it is the  
opinion of the Court against the weight of  
~~the~~ evidence but when there was no evi-  
dence adduced on the successful side - When the  
jury misbehaves, When ~~if~~ one of them is corrup-  
ted - When the witnesses are tampered with new  
trials are granted.

### Of a special Verdict

When a case is committed to a jury; they may  
if they please find the facts as proved by special  
Verdict and leave the question of law to be tried  
by the Court this answers the same purpose  
as a Demurrer to evidence or filing a bill of  
Exceptions after the Verdict and lays a founda-  
tion for a writ of Error.

### Of Writs of Error

Writ of Error lies for a

2. 16



error in Law: but it is not to be understood  
that it lies for any errors respecting the facts  
enquired into at the trial: for it is a settled  
rule that no such errors are to be alledged  
in the writ - What is meant by an error in  
fact may be thus explained - An infant  
is sued without mentioning any guardian  
and the Court will not appoint one: judg<sup>t</sup> is  
rendered ag<sup>t</sup> the Infant - This altho' it does  
not appear on the record whether they appoin-  
ted one or not is an error in fact and a ground  
for a writ - Also having been served and  
judg<sup>t</sup> rendered upon default it is an error  
in fact - Likewise when judg<sup>t</sup> is rendered by  
a default ag<sup>t</sup> a person who is out of the State  
and does not return before the sitting of  
the Court: tho' this does not appear upon  
the record yet it is error in fact - Instances  
of these writs are rare but writs of Error in Law  
are very frequent and may be brought in all  
cases where a question of law without mixture

of fact has been decided by the Court provided  
the question made and decided appears on  
record — Hence it is that Error lies upon a  
judgment in abatement where the matter  
in abatement was a question in law upon a  
Demurrer to evidence, as a special Verdict,  
a bill of exceptions and a matter in arrest  
provided the motion be some cause that ap-  
pears on the face of the proceedings —

No Error lies on an interlocutory judg<sup>t</sup>.  
till after final judg<sup>t</sup>. neither can an Error  
in Law and an Error in fact be joined on  
the same writ — The general issue is "in  
nullo est erratum" — Upon a reversal of a judg<sup>t</sup>  
of a lower Court the W<sup>r</sup> ~~recovers~~ in Error ~~and~~  
recovers all that he has been damaged but re-  
covers no cost in the suit in Error: yet you  
will find by our Statute that whenever an er-  
roneous judg<sup>t</sup>. by a justice or the County Court the  
W<sup>r</sup>. may enter his action in the Sup<sup>r</sup>. Court as  
if it came there by appeal — This in practice

is to be observed in many cases but in a



it is as well as where a Bill of Exceptions has been filed for the admission of a witness And in pleas of abatement where the merits have been not been tried it may be proper for the Pl. to enter - for instance, suppose A sues B and of less C. for a witness - objected to by B but is admitted - B is cast in the suit, files his bill of Exceptions and brings Error - the witness is adjudged inadmissible - Now it would be unreasonable if A might not enter and have his action tried on the merits - Judg. in abatement is reversed in favour of the original Pl. he must enter if he means to have this case tried

Upon writs of Error for any such matter as the last mentioned there can be no trial of facts because there is no jury

Writs of Error may be had in proceedings in Equity as well as Law - A writ of Error is a supersedeas to an Execution - Writs of Error without a bond altho sufficient to try the question of Law and on which there may be a reversal or affirmance

for it would not be reasonable to stop an Execution  
and yet no security given to refund the damage  
which such delay might occasion. And whereon  
a reversal is obtained in the Court of Errors upon  
a point collateral to the merits - as upon Pleas  
of abatement where the Court by Law had rendered  
judg<sup>t</sup>. That it should abate - or for the  
admission of testimony the cause must be sent  
back to be tried upon its merits for the Court of  
Errors have no jurisdiction - When the Error  
is an Error in fact it is to be brought before  
the same Court if that Court be a Court of Error.

### Of an Audita Querela

When the Defend<sup>t</sup>. is unsuccessful in his cause  
on the various grounds of his defence which have  
been mentioned execution will issue upon  
the judg<sup>t</sup>. against him unless some matter  
has arisen since the judg<sup>t</sup>. which if it would  
be taken notice of ought to operate in his favour  
in such case if he has had no day in Court



to shew this new matter in his exoneration he shall be entitled not *pro speciali* but in *de bito* to a writ of *Audita Querela*. In this writ are stated the reasons why Execution should not be enforced - such as payment since judgment which by negligence fraud or accident is not endorsed on the Execution - The writ is directed to the officer who has the Execution to stay all proceedings on the same untill the complaint be heard - It is signed by the C. Judge of the Court - after having examined and found probable cause for the Complaint - Upon this writ Bonds are entered to make good all damages that may be sustained if the complaint be not supported - The object of the writ is not only to set aside the Execution but also to recover the damages which have been sustained - as if after payment of the money it had been again collected upon the Execution it would be to recover it back and is in this case a concurrent concurrent remedy with an action

of Indebitatus Assumpsit for money had and received - It lies in all cases where a man has by fraud been prevented from having a day in court as where A sues B and after service they come together and enter into an engagement to stop proceedings or that the suit shall stop or be withdrawn and B gives himself no farther trouble about it: but A fraudulently proceeds and obtains judgment by default - in this case B shall be relieved by Audita Querela.


## Of the Levy of Execution

Executions are levied upon the Estate or body of the debtor - if personal Estate be turned out by the debtor the officer cannot levy on his body - Before levy demand must be made of the debtor (if he may be found) of the money due - if personal Estate is not turned out the creditor has his Election to take the body or real Estate of the debtor.



When personal Estate is taken it must be advertised 20 days on the publick sign post and then sold at vendue and the creditor paid  
If levied on the body he is to be committed to jail and there remain till released by the payment of the money or taking the poor prisoners oath or by death. In these two last cases the debt is not extinguished whilst the body was holden - it was a temporary satisfaction but as soon as released by taking the oath or by death the debt is revived - It is true that the Debtors body cannot again be taken but his Estate may be which could not be the case whilst the body was holden - it will also serve against the Execution -  
If real Estate be taken it must be appraised by 3 freeholders of the town where the land lies and be returned to the officer of the Clerk of the Court where the Execution issued which shall be sufficient evidence of a Title in the Creditor - If Chattels real or life Estates are

taken they are holden till the profits sold by the  
appraisors shall pay the debt they then revert back  
to the orig<sup>l</sup> owner - This is the doctrine of the books  
when an Execution has been satisfied by taking  
lands and the land did not belong to the debtor  
but was taken by mistake the debt is extinguish-  
ed - This appears unreasonable altho' it might  
not appear in the power of the Creditor to levy  
another Execution - yet I see no reason why he  
might not have an action of Debt on Judg<sup>t</sup> on  
which an Execution or a scire facias may issue  
So if an Execution was levied on Dower Estate  
and the same was appraised at £100 p<sup>r</sup> Ann.  
and extended for 10 years and the widow at the  
end of 5 years should die £50 of the debt is paid  
and if she left Estate I should suppose a scire-  
facias ag<sup>t</sup> her Ex<sup>r</sup>. would recover the other £50

 N. B. New Trials are not commonly granted  
to the Pl<sup>t</sup> when the action is founded in malfeasance  
granted in favour of the publick - Quere - Can they  
be in favour of individuals?



## Of Bail

Bail upon writs of Error and Audita Que-  
rela should be sufficient to answer all damages  
as well as costs otherwise the Defend<sup>t</sup> in Error  
being delayed untill the property attached be  
liberated by the intervention of 60 days after  
judg<sup>t</sup> on the Statute of Limitations ~~limited~~  
the special bail might lose his security altho'  
judg<sup>t</sup> should be affirmed — Bail on an appeal  
on judgment of a Justice of the Peace in criminal  
matters is conditioned to appear and abide  
judgment — I am of opinion that all bonds  
of appeal ought to be large enough to cover all  
damages that might ensue from the appeal  
such as Bankruptcy, Absconding &c &c,

## Of Dower of personal Estate

Our Statute gives  $\frac{1}{3}$  of the personal Estate to the  
wife upon the death of the husband — yet she  
may not hold it as she may  $\frac{1}{3}$  of the real Estate

against Creditors except such necessary house-  
hold furniture as is by law exempted from  
execution and her paraphernalia

### Of a fieri facias agt. Attorney's factors &c

When Execution issues against the absconding  
debtor upon the judgment the officer must repair  
to the last usual place of abode of the debtor &  
make demand and also make demand of the  
Attorney factor &c and if nothing is shown  
him and he can find nothing whereon to lay  
he returns what he has done or I believe some-  
times Non est inventus

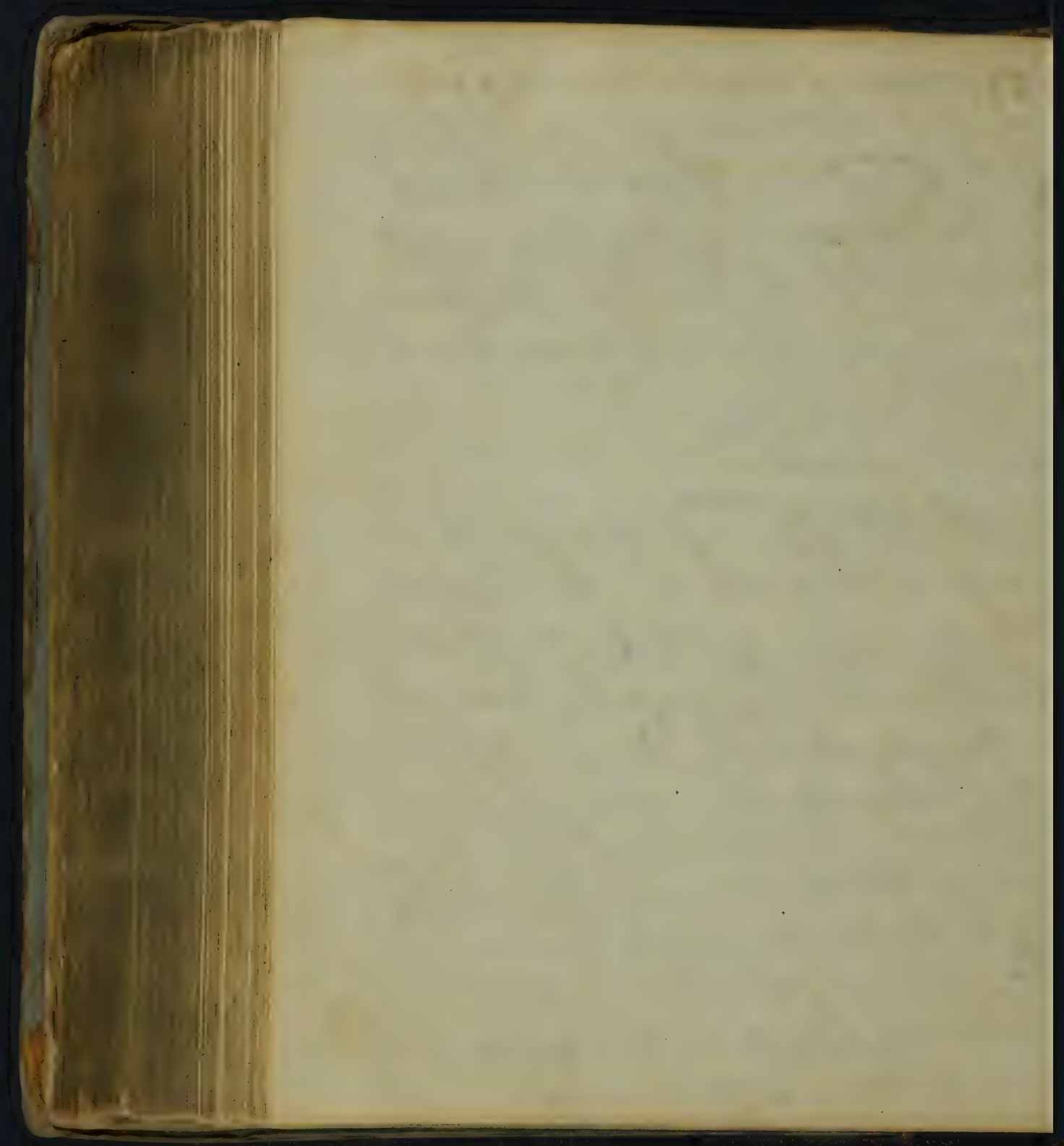
The fieri facias goes out agt. the Attorney - &  
is in nature of a petition to the Court where  
the judg<sup>t</sup>. on which it was recovered is stated to  
the Court, the suit, judgment, execution, return  
&c praying a remedy in the premises - then  
succeeds the precept to the Sheriff &c to summon  
or to make the Defend<sup>t</sup>. know that he appear



to shew reasons if any he have why judy.  
should not be affirmed ag<sup>t</sup> him - Signed by  
The Clerk of the County Court where it is return-  
able - But the attorney may turn out the  
Estate and satisfy the Execution if he pleases  
and it shall account well between him and  
his principal

Errata

Under the head of process it ought to have  
been observed that when there is a default  
to be heard in damages the Court without the  
intervention of a jury assess the damages &  
from this judgment there lies an appeal as  
in other cases and when such a judgment is  
underd upon some covenant in writing for  
damages that have arisen - and there yet  
may be further damages by reason of some  
future breach of the covenant - that when  
that event takes place a fine facias issues  
and so on toties quoties





# An Essay on Bills of Exchange

A Bill of Exchange is nothing more than a written request from one to another to pay to a 3<sup>d</sup> person a sum of money — The maker of the bill is called the drawer and the person on whom it is drawn the drawee and the person to whom it is payable the payee — It is regulated by the Law Merchant which is of general Usage of Merchants in the United Kingdom and among the commercial nations of Europe and their Asiatic African and American Colonies — This Law Merchant is recognized by Courts as the Law of the Land and is not provable by the testimony of any person whatever — It is true the Law Merchant is not universally the same in every Country and wherever a usage prevails in a Country variant from the general usage of Nations this local Usage is the same to the Law Merchant as custom is to Common-Law and this like other Customs is provable by testimony and is <sup>of it</sup> proper to be presumed that the drawer has rec<sup>d</sup> money from the payee and that the Drawee has the effects of the drawer in his hand



to the amount of the Bill, if he accepts it.  
But this is by no means necessary to the value  
of the Bill: for whether the drawer has re-  
ceived the money of the payee or not or whether the  
Drawee has effects of the Drawer in his hands  
or not the drawer is liable to the payee in case  
the drawee does not accept the Bill or has accepted  
it and refuses to pay it. When the payee has  
the Bill and presents it for acceptance if the Drawee  
refuses to accept it: it then becomes the duty of the  
payee to give the Drawer notice of such refusal  
that the drawer may have an opportunity to  
withdraw his effects if any in the ~~Drawee's~~  
(Drawee's hands and by means of this notice  
the Drawer becomes liable to the payee in  
action of debt or indebitatus assumpsit: If  
the Bill be accepted and not paid according  
to the tenor of the Bill the payee must give  
the Drawer notice of the non-payment that  
he may charge the Drawee as in the case of non-  
acceptance and if this notice be not seasonably  
given any loss is occasioned by the removal  
bankruptcy of the Drawee the loss must fall  
upon the Drawer for in case of non-acceptance



The neglect of the payee in not giving the Drawer notice is considered as a discharge from the payee to the drawer: for he could have withdrawn his effects that were in the hands of the Drawee in case of non-<sup>payment</sup> acceptance the payee is considered giving credit to the drawee and the payee has an action on the case ag<sup>t</sup>. the Drawee and by giving notice of nonpayment he has an action against the Drawer and it is optional with him against whom he will have his remedy - and if he sues one in preference to y<sup>e</sup> other and cannot obtain payment of the one whom he sues he may resort to the other - The mode of giving notice to the Drawer of a refusal to accept or pay the acceptance is ordinarily by protesting the Bill which is done in writing and in y<sup>e</sup> presence of a Notary-public which protest is entered by the Notary to have ~~been~~ been done. If there be no Notary the same is <sup>inhabited</sup> done in y<sup>e</sup> presence of two or more respectable persons and by them attested which protest is sent back to the Drawer by the first post after the time

of payment and when this mode of notice is  
pursued not only the contents of the Bill as  
in common bills, but the damage sustained  
thereby in most countries estimated at  
£20 p.c. are recoverable: If the bill be accepted  
to be paid agreeable to the tenor of it and not  
paid at the time or day of payment there is  
by the Law Merchant 3 days allowed called  
days of grace - If the Bill be drawn payable  
in a month and accepted payable in six months  
this shall bind the acceptor according to his ac-  
ceptance: and yet if the payee will charge the  
Drawer he must get the bill protested for non-  
acceptance - The Law is the same when the  
Drawee accepts the Bill for part and refuses  
to accept for the remainder - Whatever opi-  
nion may have formerly prevailed in Courts  
respecting partial acceptance it is now settled  
that such an acceptance binds  
Any words which indicate the Drawee's  
~~intention~~ assent to pay the bill on accep-  
tance and altho' in other countries it is



requires that there should be a consideration or  
evidence of such consideration from the ac-  
knowledgment of (Value recd) yet in case of  
Bills of Exchange if there be no consideration  
in the engagement or it be upon a part  
consideration the person contracting is bound.  
When a bill is made payable to y<sup>e</sup> payee  
or order the payee may endorse it over to  
another person and the property becomes  
the indorsee's who has the same remedy against  
the Drawee and Drawer <sup>as</sup> the orig<sup>l</sup>. payee had  
and also ag<sup>t</sup> the indorser who is considered as  
making a new Bill and if there are ever so  
many indorsors he may have his remedy ag<sup>t</sup>  
them whom ~~he~~ he elects and they in their turn  
ag<sup>t</sup> any indorser prior to themselves - What-  
ever discordant opinions be found in the books  
it is now settled that an indorsee may sue  
any indorser without making any deman-  
d of the drawer or endeavouring to recover the mo-  
ney of him - 2 Burr: 670 - When an indorsee

sues an indorser he need not prove the Drawer  
for if it be forged the indorser is liable Saltr. 127.  
When a bill has been accepted it is the last indorser  
who has a right to the money and can sue the Draw-  
er: but if a prior indorser pay the last indorsee  
may sue the Drawer - If an indorsee or payee  
accepts any part of the Bill of the Drawee he  
can never resort to the Drawer or indorser - It  
is not in the power of the payee to indorse part of  
the Bill so as to subject the Drawer to more action  
than one but if such indorsee will acknowledge  
satisfaction of the remainder upon the bill such  
indorsement is good Saltr. 65. An indorsement in  
blank with only the indorsors name puts entirely  
in the power of the Holder to fill up the blank as he  
pleases either with an assignment of the Bill  
or a power of Attorney and whatever it be the  
indorser is included thereby Saltr. 128. But until  
the blank is fill'd up it is no evidence of the prop-  
erty Saltr. 130. A Bill to one or bearer  
is not assignable Saltr. 125. If such bill be  
lost or stolen it vests no property in the finder or  
thief: yet if the Drawee pay such bill it shall be  
allowed him by the Drawer and if such finder  
thief pass the bill to another person who is not  
privy to the writing a property in the Bill



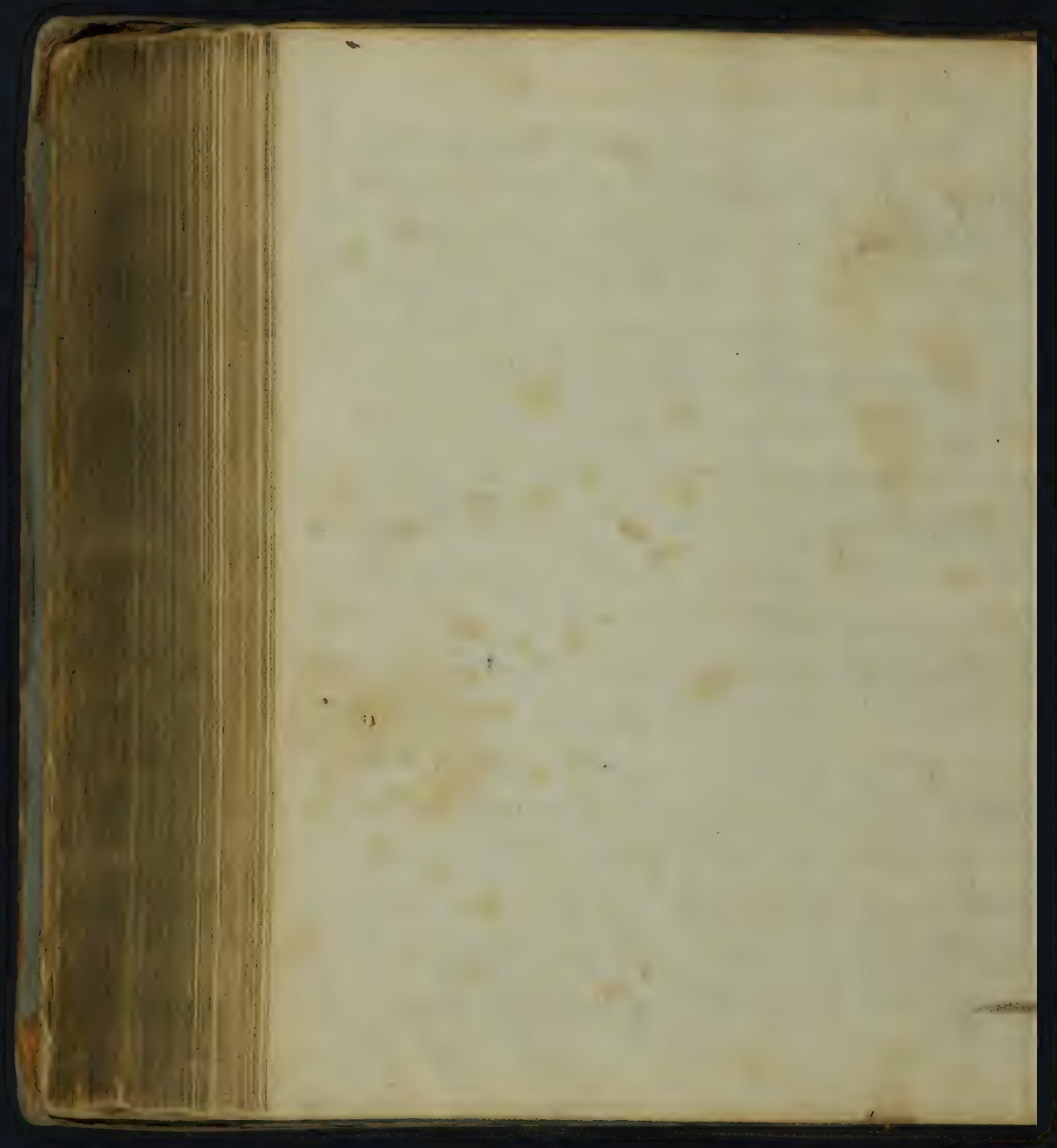
thereby acquired in the transfer. If a drawee  
refuses to ~~accept~~ accept a Bill it may be accepted  
by a person on whom it is not drawn for the  
honour of the Drawer and such acceptance is  
binding. In this case the Bill must be pro-  
vided so that the Drawer may be charged by the payee  
or by the acceptor. In some instances the drawee  
may have an action on the case agt. the drawee  
if the Drawee accepts the Bill and afterwards  
refuses to pay it and the ~~Drawer~~ Drawer has been  
obliged to discharge the payee for the acceptance.  
The Drawee shall be prima facie evidence of  
the Drawee has effects of the Drawee in his hands  
that amount and by the custom of Merchants  
subjects the Drawee to the Drawer. But altho  
acceptance is prima facie evidence that the  
drawee has effects yet if it appears that the  
Drawer had not the effects of the Drawee in  
his hands the Drawer will fail of a recovery  
if the acceptance is for the honour of the Drawer  
that case no <sup>action</sup> acceptance is maintainable  
by him agt. the Drawee upon the custom for  
from such an acceptance no presumption arises  
that the Drawee had effects in his hands  
2 bill may be indorsed to the Drawee. 11

indorsee may maintain an action agt. the Drawee after acceptance; on the other hand the Drawee who has paid the Bill may maintain an action agt. the Drawer for so much money laid out at his request: But if it appears in evidence that the Drawee at the time of payment had in his hands effects to the amount of the Bill drawn he will not prevail - When the Drawee accepts and the bill is indorsed the indorsee may maintain an action agt. the Drawee altho' the Drawee's name was forged: but the payee could not maintain any action for in that case he would receive a benefit from his own wrong yet an innocent indorsee is not to suffer probably rec'd it upon the evidence it upon evidence of the acceptor who is supposed to be acquainted with the hand writing of his correspondent - When the holder of a Bill of Exchange has sued an indorser and taken his body in Execution which proved insufft. to recover the money due altho he set such indorser at



He may yet resort to any other indorser -  
When a Bill is drawn on acceptor to pay it af-  
ter paying a prior acceptance which he accepts  
altho' he has ~~a~~ a lien upon the goods of the  
principal in his hands for the payment  
of his account ag<sup>t</sup> y<sup>e</sup> principal - yet he shall  
not be allowed to retain effects to his own ac-  
count ag<sup>t</sup> the Bill so accepted - A note to the  
bearer is a negotiable instrument, tho' not a  
Bill of Exchange: for every bill of Exchange  
must be made payable to order - and yet it  
appears an unsettled point whether it be good  
without an acknowledgment in the Note "Value  
received" tho' I think the better opinion is that this  
is not necessary - When an Indorser has re-  
ceived part of y<sup>e</sup> sum of an indorser he shall not with-  
standing receive the whole from the drawer -  
A Bill made out of a particular fund is no  
Bill of Exchange nor one payable upon a  
~~future~~ future uncertain Contingency

Lithfield Jan 26. 94





# Of the Law Merchant

The Law Merchant is a Rule of conduct observed among mercantile people and respecting mercantile transactions generally.

It obtains in the commercial nations of Europe their Colonies in all parts of the world and in this Country.

It is not different in different countries but the same or nearly the same line of conduct is pursued thro' the whole so that it is in a manner the Law of Nations.

It is sometimes, may often called a custom tho' it is not properly termed a custom for a custom is a mere local usage obtaining in a particular place only. So again a custom if necessary to be made use of must be proved in Court in the same way as a fact whereas the Law Merchant is never to be proved but is considered as being understood by the triers as the law of the land. Indeed it may in one point of light be considered as a custom (and perhaps from this might arise the idea of its being a custom) for it obtains among a certain class of people only (viz)

merchants. Tho' there are some things governed by  
the Law Merchant that it does not directly respect  
Inst: Bills of Exchange if between 2 attorneys  
or two blacksmiths are gov<sup>d</sup> by the Law Merch.  
So again policies of insurance are gov<sup>d</sup> by this  
Law.

However there are some particular places where  
the Law Merchant differs from the rule generally  
established - in such case that particular custom is  
to be proved in the same way that a custom is  
at Common Law.

It will be found that this law  
depends upon usage established by the adju-  
dications of courts and the concurrence of customs  
thereto - and indeed it has been altered but very  
little by Statutes - nor does it arise from old and  
antient Statutes that are and long have been an-  
tegrated - but on the contrary it has all grown  
up since Statutes have been recorded and has arisen  
merely from the adjudications of courts.

It is in very many respects different from the com-  
mon Law and governed by totally rules and



principles the most prominent of these differences we will proceed to point out—

1<sup>st</sup> By the Common Law it is absolutely necessary that there be a consideration to every kind of contract and altho' it is no matter how small this consideration is yet there must be a consideration - The absurdity of this idea is abolished from the Law Merchant - for by that it is not necessary that there be any consideration to a contract—

2<sup>d</sup> Fraud in the consideration of a contract by the Law Merchant wholly vitiates and destroys the contract, as much as fraud in the execution of it - Indeed all kinds of transactions done under the Law Merchant be as chaste as Caesar's wife not even suspected - and suppressio veri is of as much weight and will vitiate the contract as much as suggestio falsi - Tho' indeed the concealment merely of a man's own speculations does not vitiate or destroy the contract - as if A ~~had~~ having a ship in the East-Indies, being fearful there will be a war and even ~~from~~ from the appearance of ~~allies~~ he is

certain in his own mind that there will be a loss  
goes to an insurer and without communicating  
these apprehensions wishes to get his ship insured  
The ~~insurance~~ insurance made in this manner is  
not vitiated by that concealment - for the insurer  
had the same liberty to make speculations as  
A but if in the case just there had a frigate arrived  
with the news of a declaration of war and A  
had concealed this from the insurer it would have  
destroyed the insurance -

3. By the Common Law if a joint debtor  
tho' any means gets a release from the creditor it  
is a release of the other ~~tho'~~ tho' there be no satisfaction  
for the release - This rule however does not obtain  
in the Law Merchant - there the creditor may  
release one and it will be no release to the other  
joint debtor unless indeed he has been satisfied for  
his debt in that case a release to one is a release to  
both - 4<sup>th</sup> At Common Law parol evidence  
is never admitted to contradict or vary the effects  
of a writing: But under the Law Merchant



parol evidence has often been admitted to contra-  
dict policies of insurance &c. tho' parol evidence  
is not always admitted to contradict writings. And  
indeed it is very difficult to draw a line of dis-  
tinction as to admission or not - and there are no  
exact rules - but whenever justice requires it, pa-  
rol testimony is admitted to contradict the wri-  
ting.

5<sup>th</sup> Another very material difference be-  
tween the Common Law of England and the  
Law Merchant is that by the latter there is no such  
thing known as the *ius accrescendi* - the rule es-  
tablished by the Law Merchant however, ob-  
tains as Common Law in Connecticut.

On the death of one of the parties the part-  
nership is dissolved and the Ex<sup>r</sup> of the de-  
partner takes the part that his testator owned.

If they owned in equal shares the Ex<sup>r</sup> takes (Comp. 445)  
one half &c. Indeed the Ex<sup>r</sup> is strictly in every  
sense of the word a tenant in common with  
the surviving partner with one single exception  
(viz) the surviving partner alone possesses the

right of suing and the liability of being  
sued - The old authorities however are that  
the Ex<sup>r</sup> may join in suing and be joined when  
Talb. 444. sued - When the partner has recovered money  
he is liable to the Ex<sup>r</sup> for  $\frac{1}{2}$  the sum so re-  
covered - If the Ex<sup>r</sup> will not deliver up the pro-  
-prietor's share <sup>are</sup> in ~~the~~ his hands respecting the  
partnership a compulsory process may issue  
against him from Chanc<sup>y</sup> and compel him to  
deliver them up to the survivor -

If the surviving partner is a bankrupt  
and the Executor a man of property the cre-  
ditors may resort to the Ex<sup>r</sup> and he will be  
liable -

If one partner die leaving a surviving part-  
ner and after the survivor die leaving an  
Ex<sup>r</sup> the Ex<sup>r</sup> will stand in the place of his tes-  
tator as to the right of suing and liability of  
being sued - If both of the partners should die  
at once and the same instant as by lightning -  
2 Vig. 265



but it is apprehended in such case both  
Ex<sup>r</sup> must join and be joined in a suit. A  
judg<sup>t</sup> say: the survivor for a debt due before  
the death of the dec<sup>d</sup>. Further is a partnership  
debt.

Formerly it was held as a rule that  
when judg<sup>t</sup> went ag<sup>t</sup> a partner in his private  
capacity and not as partner the officer must  
search ~~and~~ for private property whereon to lay  
it: if that could not be found he might lay  
upon the partnership property. But now the  
officer is not obliged to seek for private prop-  
erty - he may lay at first upon partnership pro-  
perty - When the officer has taken the property  
it is sold by mortgage and the vendee becomes  
tenant in common of that property with  
the other partner - But: the officer has taken  
10 pieces of silk and sets them up at vendue  
the bidder bids  $\frac{1}{2}$  of their real value and when  
struck off to him owns one half as tenant  
in common with the other partner <sup>by</sup> this means



39 *Salk:* The property of the other partner is not damaged and all the inconveniences that he sustains are that he becomes partner of ~~that~~ the property with the vendee and not his former partner whereas formerly it was the practice to continue selling property till they had received double the sum of the execution and then pay half to the other partner.

When a company have become bankrupts the property which they owned in company to pay their partnership debts, and their private property their private - Inst: A and B become bankrupts, they each of them have private property - and they have partnership property or that which they own in partnership - Their private debts are to be settled by their private property and their partnership debts from their partnership property - If the partnership fund be insufficient and either of



1<sup>st</sup> Their private properties is more than large  
2<sup>nd</sup> enough to pay all the private debts - The Sur-  
plus is to be carried over to the partnership  
3<sup>rd</sup> fund and the partnership creditor paid  
4<sup>th</sup> therefrom - So again if the private property  
5<sup>th</sup> of one is insufficient to pay his private debts  
6<sup>th</sup> and the partnership is more than sufficient then  
7<sup>th</sup> the surplus of the company estate is to be equally  
8<sup>th</sup> divided and if carried to the private property of  
9<sup>th</sup> each and the private creditors satisfied out of it  
10<sup>th</sup> So that in this way complete justice is done  
11<sup>th</sup> as far as the estates of either held out

12<sup>th</sup> From the above it is evident that the Eng.  
13<sup>th</sup> Law as to the distribution of the Estate of a  
14<sup>th</sup> bankrupt tallies very much with the average  
15<sup>th</sup> Law in this State - The object of the Eng.  
16<sup>th</sup> Law seems to be that the creditors shall all  
17<sup>th</sup> be equally paid during the life of the testator  
18<sup>th</sup> but after his death some are to be paid while



thus are left unpaid: on the contrary our  
Law seems to care but little about the pay-  
-ment of a man's debts when living for his  
creditor may any time get secured by a fact  
but after his death it is determined that his  
property shall be equally distributed among  
his creditors at all events —

### Of Bills of Exchange promissory Notes & —

A Bill of Exchange is nothing more than a let-  
ter from one to another requesting him to pay  
a sum of money to a third person or order  
that is to any one whom the 3<sup>d</sup> ~~person~~ person  
shall name and the evidence of such order is  
the endorsement of the payee — The parties to  
bill of Exchange are — 1<sup>st</sup> The Drawer of the bill  
2<sup>d</sup> The Drawee — 3<sup>d</sup> The payee or person to whom  
the money is to be paid — 4<sup>th</sup> The acceptor viz, the payee



Drawee if he accepts - 5<sup>th</sup> The payee if he indorses  
the bill is the endorser - 6<sup>th</sup> The person to whom  
the bill is indorsed is the endorsee 7<sup>th</sup> The person  
in possession of the bill is called the holder -

A bill of Ex. is sometimes payable at sight  
some times after so many days or months  
or at usance - If the bill is payable after so  
many days or months a certain length of time  
are allowed for payment after the expiration  
of the time set in the bill called "Days of grace"  
which are commonly three days tho' varying in  
different Countries - If payable in so many ~~months~~  
months "Calendar Months" are meant - If a  
bill be payable at usance it means a certain  
length of time according to the usage of the place  
where it is payable varying in different pla  
ces - In this Country the term Usance means  
30 days - after the expiration of the usance 3 days  
of grace are allowed for payment -



## Of the terms "From the date"

The ~~terms~~ terms from the date and the day of the date have caused much litigation - authors seem to have made this distinction, that from the day of the date excluded the day on which the date was made - but there is a case in *Comps*: in which L. J. Mansfield treats such distinctions as idle *comps*: and says "We will consider them meaning the same or not meaning the same as justice shall demand" -

In *Bills of Ex*: the above terms are construed to mean one and the same thing - *including* the day of the date -

Where days of grace are allowed for the payment of a bill and the last day should happen on a Sunday the bill must be paid on Saturday and cannot be postponed till Monday -

Such promissory notes as are negotiable by the Law-Merchant are such as "promise to pay to



At or order. at Common Law such notes were  
not negotiable but are made so by Stat: of Am  
this Statute clearly contemplates them as not <sup>sub</sup>  
being negotiable at Common Law and there <sup>129</sup> <sup>L. Ray.</sup>  
fore expressly declares them so. But Mr. Chip <sup>757</sup>  
man of Vermont supposes promissory notes <sup>Chip.</sup>  
were always negotiable at Common Law <sup>Prop.</sup>  
and endeavours to prove it even from the very  
nature of the note in consequence of which a  
number of decisions have taken place in that  
State declaring them to be negotiable - And  
tho' our Courts in Connecticut deny their nego-  
tiability yet they countenance a sale of them  
as much as any article whatever unless they  
are bought for the purpose of villainy.

This manner of treating promissory notes is  
often extremely inconvenient to the maker of  
the note and to the orig<sup>l</sup> obligee, for as the case  
may be the Drawee may be subjected to a bill  
of cost and the maker to a double payment of

The note - The vendee cannot bring the action in his own name but must bring it in the name of the Drawee and should he fail of a recovery the drawee would at all events be liable to pay the cost because the suit is in his own name. So if the maker of the Note should pay the money to the orig<sup>l</sup> obligee still he would be liable to pay it again to the Vendee or should the orig<sup>l</sup> obligee release the obligor it would be good against the Vendee and he must sue the obligor in an action of fraud for accepting such release.

The Eng. Courts have not gone so far as to sustain an action upon such assignments.

Carth: Other persons as well as merchants may  
160 bind themselves by a bill of Ex: but an Infant  
292 cannot even for necessaries and the reason why he is bound at Common Law by a single bill does not apply to a Bill of Ex: for at Common Law an enquiry may be made into the consideration of a single bill but to enquire into the consideration of a bill of Ex: would defeat their negotiability.



It has been questioned whether a Bill would not bind an infant for necessities provided it was expressed to be for necessities in the body of the bill it is apprehended it would not for its being expressed in the bill is no more than the minor himself expresses and since the nature of the contract is such that the consideration cannot be enquired into it matters not how and in what manner it is expressed to be for necessities when in fact it is not.

Where there are two joint drawers and one of them accepts the Bill of Ex: it is an acceptance by both <sup>Saltn.</sup> 126 and both are liable for the payment.

It is observable that a maker of a Note and Drawee of a Bill of Ex: are in the same situation for the Drawer of the Note is the acceptor and engages to pay: after this the parties to a promissory note are the same as to a bill of Exchange.

A Bill payable to such an one or order is the same <sup>Burr.</sup> 1518. as to pay the order of such an one - If payable to the <sup>Burr.</sup> 452

bearer it is still a negotiable note tho' the anti-  
-ent authorities are opposed to this idea. Such notes  
become negotiable by delivery only and then need  
no endorsement but the bearer must be a bona  
fide bearer and not a fraudulent one

### Of Bank Notes

These are considered in the same manner as  
and pass as such and the bona fide purchaser  
is entitled to the payment tho' it came to him  
by a male fide possession for they passing a cash  
in the country it would injure trade if they  
32 Denf. 554. were not considered as such - So as appears from  
the construction given to the annuity act - Bank  
notes are considered as a good tender tho' the question  
has not been directly determined yet if no obje-  
-tion is made on that account, they are a good tender

### Of Bankers or Bankers cash notes

These are not considered as cash but merely as



exercised, but when given from one man to  
another as a payment they are cash. But  
if the Banker fails of payment the payer  
of the Note becomes the loser unless he has  
made application to the banker for the mo-  
ney in a reasonable time. What shall be con-  
sidered as a reasonable time is a question of  
Law which depends upon the circumstances  
of the case - so that if a special Verdict should  
state the facts as they are the Court could deter-  
mine the case tho' in case of a special Verdict  
in other cases the Court could not make in-  
ferences - The cases in the books respecting these  
notes are of transactions in a City between par-  
ties in the same City -

It seems to have been a question in the books  
whether a consideration need be alleged in a bill  
of Ex: or promissory note and the old authori-  
ties are that there must be a consideration  
alleged but by the later authorities no considera-  
tion need be alleged

1 Str:

415

=16: 550

2 Str: 910

:1248

:1175

Lex. Mon

482

1 Plh:

445

Of the essential qualities of a Bill of Exchange  
or negotiable Note

Str. 1271. First. The Bill must be for the payment of money

Secondly. It must depend upon the personal credit of the Drawee and not upon any particular fund but the fund must be supposed to be in the hands of the Drawee - A draws a bill upon B. to pay to

Pay. C. so much out of his growing subsistence which he was entitled to receive from his hands - This was determined not to be a Bill of Exchange because payable from a particular fund - The case of the Devonshire mines which was to pay so much out of those ~~mines~~ mines determined not to be good

W. 207. So again where the bill was to pay £200 from the Steward's money: it was held bad

Str. 1211. So the case of a bill drawn by the owner of a ship upon the freighter to pay so much on account of freight - it was held to be no bill of Exchange but where the bill was made payable out of



the Drawers half pay to become due six months  
hence the Court held it to be a good bill, for this L<sup>d</sup> Ray.  
was only pointing out the fund to the Drawer <sup>1401</sup>  
out of which he might reimburse himself. <sup>Str. 762</sup>

So a promissory note to be paid out of rents  
and profits arising from the land of the Drawer  
in such a place is held negotiable - so that a pro<sup>Str.</sup>  
missory note may be negotiated tho' payable out of  
a particular fund —

A negotiable note must not depend on any  
contingency that may not possibly happen <sup>Burr.</sup>  
the time however need not be fixed as a note pay<sup>Str.</sup>  
able in so many days after his fathers death. <sup>223</sup>  
<sup>Will.</sup>  
<sup>213</sup>  
The event must be such as may possibly or pro<sup>Burr.</sup>  
bably never happen so that the note may <sup>1563</sup>  
perhaps never become payable: but if the pay<sup>1362</sup>  
ment depends upon an event which is certain &  
necessary and no otherwise nor in any other respect <sup>1396</sup>  
uncertain than merely as to the particular time <sup>Str. 115</sup>  
when it will happen the note is good. <sup>1217</sup>

It is not necessary that the uncertainty be abso-

-lutely and physically certain but if it be morally  
Will: certain the note will be good - as if the note be for the  
263 payment of wages &c

There is no case to be found in which these circum-  
stances have attended a Bill of Exchange but the  
cases to be found are all cases of Notes -

These circumstances do not apply to contracts  
but all contracts depending upon contingencies  
notwithstanding they be destitute of the beforemen-  
2 Blach. tioned requisites are good contracts between the par-  
1072 ties concerned upon principles of the Com. Law

No set form of words are required to constitute  
a promissory negotiable note or Bill of Exchange  
but if the note be within the intent of the act it is  
sufficient tho' it does not follow the words of the act  
2 R. "Deliver such a sum of money" makes a good bill  
1396 of Exchange - So a promise to be accountable will be  
sufficient in a note &c

The words "Value Rec<sup>d</sup>." have been determined  
not necessary in a Note in order to negotiate it



for <sup>they are</sup> ~~it~~ only evidence of a consideration and  
since a consideration is not necessary neither  
are these words —

Omōd.  
267  
1401.  
1555.

It has been questioned whether the words  
"Order or Bearer" are necessary in a Bill of Exchange  
but no direct decision has been had upon it. In 2<sup>d</sup> Will  
the case in Willson it was thought necessary by the  
jury tho' no decision of the Court — The general  
~~received~~ <sup>opinion</sup> however is that they must be inser-  
ted —

### Of the acceptance

After a Bill is drawn and delivered to the payee  
it is generally understood unless the contrary ap-  
pears that the Drawer is in debt to the payee  
and after the Bill is accepted by the Drawee that  
he owes the Drawer but this is not always the case  
for it may be that neither the Drawer is indebted  
to the payee nor the Drawee to the Drawer and  
whether this be the case or not is immaterial

The payee applies to the Drawee for acceptance

who refuses or not as he pleases but the ~~moment~~ <sup>moment</sup>  
that he accepts he becomes liable to the payee  
or any after indorsee who may happen to hold  
the Bill and any of them may bring their ac-  
tion ag<sup>t</sup> him. If the Bill be accepted and not  
paid at the time it becomes due the payee  
may sue him or the Drawer and if it has been  
indorsed by indorsement, two or more times  
the last indorsee may sue whom he pleases  
either of the indorsees, the Drawer, Acceptor, or  
Payee and having failed of a recovery from  
one he may resort to another and no failure  
will be a bar to sue another. And if an in-  
dorsor be sued he may sue a prior indorsor.

It There seems originally to have  
been much litigation about the manner of  
acceptance whether it would be in any other  
way than by a writing for it was said that a  
verbal acceptance would have no operation because  
of the Statute of Frauds and Perjuries which attaches  
itself to all kinds of transactions but it has since



been determined that verbal acceptance is good &  
that the Statute of Frauds does not embrace mere  
casual transactions. 3 Burr.  
1674

A Bill is ordinarily presented for acceptance  
before it becomes due but this is not absolutely  
necessary and if it be presented for acceptance  
after the day of payment has elapsed and the  
Drawee accepts it the acceptance is good and 3 Burr.  
1660  
10 Al.  
611  
becomes payable at sight and all the consequences  
of a regular acceptance are attached to it. Salk.  
127

A Bill may be accepted by a person on  
whom it is not drawn in such case the person  
accepting does it for the honour of the Drawer  
as it is called and the drawer is liable to him  
as tho' he had been the person on whom the  
bill was drawn - This furnishes evidence of  
the truth of the proposition that one man by  
the Law Merchant may render another his  
debtor contrary to his will and without any con-  
tract or consent on the part of the debtor -

An agreement to accept a bill amounts 3 Burr.  
1663

to an actual acceptance provided credit be given  
to the person on whose credit the bill is drawn  
and should this person become a bankrupt  
previous to the draught of the bill yet the  
agreement cannot be needed from even if  
it be given by the intended drawee of his  
refusal to accept on that account —

An acceptance may be binding upon  
Will: ~~the~~<sup>terms</sup> accepted tho' not according to the tenor  
of the Bill — as if it be accepted for a less sum  
than that specified or it may be accepted up  
on a condition — as I will pay it if A does  
not — Almost any thing will amount to an  
acceptance even an intimation that he will  
accept is binding as an acceptance — as if he  
should say leave the Bill and I will accept it to  
morrow &c —

As to a written acceptance it is difficult to  
set a rule but any thing written on the bill un-  
less it be expressive of a refusal amounts to an  
acceptance as if the word presented be written on  
the bill it is an acceptance seen &c —



## Of the manner of negotiating Bills

If the Bill be to the bearer it becomes negotiable by the delivery - if to order it becomes negotiable by an indorsement either specially or a blank indorsement - After the bill has once been indorsed in blank it need not be again <sup>Do you</sup> indorsed to make it payable to any one <sup>611</sup> who shall not be the holder if the first indorsement be filled up by directing it to be paid to such an one there must be a second indorsement to make it payable to the bearer -

If a bill be indorsed by blank and passes into a number of hands the person last holding has no reason to sue any one but the acceptor the Drawer and the Indorser - yet it is settled law if these are unable to pay he may come upon him from whom he rec<sup>d</sup> the bill and this upon principles of the Common Law -

It is not necessary that the blank indorsement be filled up to entitle the holder to an action: for

It may be filled up at any time even at the  
bar and ~~it may be filled up~~ by any per-  
son who has the bill. Such indorsement  
3 Barn.  
1516. may be made at any time before or after the  
time of payment of the Bill even after the  
bill has been refused to be paid the indorsement  
may be filled up.

If an indorsement be made  
upon a blank note before the sum is put in  
Doug:  
496 the indorser is liable for such sum as shall be  
inserted - The holder of the Bill may fill the  
blank with an order to pay him or may fill  
it with a power of att<sup>o</sup> to collect or if paid he  
1 May:  
876  
Talh:  
120. may fill such blank with a receipt - In the  
first ~~case~~ case if a suit be brought it must be  
by the holder in the last case it must be by  
the indorser.

If a bill be drawn by A in fa-  
vor of B. ag<sup>t</sup> C and B endorses to D blank  
who carries it to C to accept and he pockets  
it B may bring his action of Trover ag<sup>t</sup> C.



and produce D as a witness

It seems to have been a question whether an indorsement to pay the contents to such an one without the words "Or order" would be a negotiable instrument but it is now determined that such general description of the payee does not restrain the negotiability of the Bill: for a bill once negotiated shall not be restrained unless there be words expressly indicative of a restriction and no parol evidence will be admitted to prove the existence of a usage when it has once been adjudged different by the Court and ingrafted into the general law of the Land parol proof may be admitted to prove it.

The negotiability of a Bill may be strained as mentioned above by proper words. instance A draws a bill upon B in favour of C. who indorses it over to D. to pay it over to E. for his use - here the negotiability is restrained to E. and cannot be indorsed over by E.

2 Burr  
1216.

Black  
295.

2 Burr  
1227

Doe  
615.8



An infants indorsement has no operation upon him but is like all other contracts by an infant but if there be an indorsement by an infant and afterwards other indorsments the after indorsers are liable upon their indorsements.

Doug. Bank Notes Bills of Ex: &c when lost or stolen  
611 and endorsed over an innocent indorsee shall  
Bun. not suffer thereby but may recover of the  
452 Drawer or Banker  
405.

An indorsement by one of two Merchants in C<sup>o</sup> binds both: but where two are not in partnership and a Bill be drawn in their favour an indorsement of one will not bind both: In

B. B. however it was determined by L<sup>d</sup> Mansfield  
Doug. that an indorsement by one of two who were  
630 not in C<sup>o</sup> did bind both but this judgment was reversed in the Exchequer Chamber.

A Bill drawn in favour of a feme sole who afterwards marries: an indorsement made by the husband is effectual and it cannot be indorsed by the wife.



So the assignees of a Bankrupt may  
indorse a bill drawn in fav: of the bankrupt <sup>Sta: 1260</sup>

So again an Ex. or Adm. may indorse a bill  
in fav: of the dec. for which they are personally <sup>Def. 407.</sup>  
liable and if it be indorsed to them they may  
declare as such ag<sup>t</sup> the acceptor —

A Bill payable to one or order for the use  
of another the payee may indorse and assign  
it to another by the custom of Merchants — <sup>Carth. 5.</sup>

It was formerly a practice to indorse a bill  
for part of the sum expressed in the bill but  
it is now settled that a bill must be indorsed <sup>Carth. 466.</sup>  
for the whole or none for otherwise the Draw-  
er would be subject to two actions in one con-  
tract and also the Drawee would be subjected  
to the same inconvenience which the Law  
will not allow —

Of the engagement of the parties to a bill  
and t. of the Drawer —

The Drawer when he gives a Bill he im-  
pliedly contracts with the payee — That the



Drawee is a person capable of binding himself by an acceptance 2.<sup>d</sup> That he is to be found as described - 3.<sup>d</sup> That he will accept the Bill - 4.<sup>th</sup> That he will pay it on failure of any one of these engagements the drawer is liable to the payee or any indorsee for the contents of the Bill and as the case may be for damages and cost

Henf. A Bill may be ~~made~~ good where the Drawer  
BC. only writes his name blank with an authority  
313. to fill it up as a Bill and Courts will let in parol testimony to prove that the Drawer gave this power to the payee to fill it up and the indorsee may recover ag<sup>t</sup> the Drawer the sum contained in the Bill

If a Bill be drawn payable at a future time and presented for acceptance before the Doug: day of payment and the Drawee refuses to accept  
55 it the Drawer immediately becomes liable for what the Drawer has undertaken has not been performed the drawee not having given him credit which was the ground of the contract and the Case in Strange proves the

Str:  
949



Drawer to be indebted to Drawee before the time of payment.

### Engagements of the indorser

Every endorsement is in nature of a new bill and when endorsed nothing but payment of the money will operate as a discharge - the indorser therefore is as a drawer and the indorsee as a payee and the indorser enters into the same engagements that the drawer does. If he therefore engages to pay to the indorsee or any subsequent indorsee - if it be a blank indorsement he engages to pay to the holder or bearer. If the holder sue the drawer and obtains judgment agt. him yet he may sue <sup>3 Mod.</sup> any one indorser and the prior judg<sup>t</sup> will be <sup>Ob.</sup> no obstacle - the case in Mod. was agt. this doctrine but afterwards reversed.

Election was the ground upon which this case was determined - that when a person has two remedies if he elects one he shall not resort to the other.

But this rule as generally laid down in the books is not true - it is confined to this - if a man has two separate and distinct remedies upon one contract and he elects one he shall not resort to the other if in the first he fails

To this general rule however there is an exception (viz) in the case of a mortgage the mortgagee may pursue all his remedies at once - he may eject - file his Bill &c

<sup>2 Blk:</sup> In the case of a Bill of Ex the holder may sue all the indorsors successively till he gets satisfaction and having taken one on an execution he may release him and resort to another but a Comm: Law a release of one is a release of both

Of the engagements of the holder or payee

To entitle the holder of the Bill to come back upon the indorsors he must first present the bill to the drawee for accep



tance - as to this no rule has been fixed, but  
it must be done at least at the time of pay-  
ment: when any time is limited if it be pay-  
able at sight it must be done on a conveni-  
ent time. 2<sup>d</sup> If after a presentment the drawee  
refuses to accept the holder must give notice  
to all persons concerned if he means to lay  
a foundation for a recovery ag<sup>t</sup> them: if he  
does not and any loss is sustained by the  
failure of any person concerned it falls up-  
on the holder if however he cannot find the  
Drawee &c he would not be a loser provided  
he used due diligence to give notice. 5 Barn 2671

So if the Bill be accepted and refused to  
be paid notice of this must also be given to  
the Drawer that he may have an opportunity  
of securing himself and if this notice is not  
given and the Drawee becomes a bankrupt 1 Den 712  
the Drawer is discharged and the holder becomes  
the loser. It may be that notice is not

necessary to be given to the Drawer, of the non  
acceptance & as if it be in proof that the drawer  
Dumf. has no effects of drawers in his hand altho' the  
410 presumption be that he has effects.

An acceptance may be variant from the tenor  
of the Bill - as an acceptance for a less sum &c  
in such case notice must be given to the par  
ty in order to come back.

3<sup>d</sup> The holder at the day of payment must  
present the Bill whether it has been accepted  
before or not upon the ground that the drawer  
may have since changed his mind.

So if the Drawer has become insolvent  
or absconded - notice must be given and it is  
not enough to charge the Drawer that he had  
Dumf. notice in some other way than by the holder  
170 himself but it is necessary that notice be given  
by the claimant himself.

Notice must be given in a reasonable time  
which in a foreign Bill must be by the first  
Post: but as it respects inland-bills no rule can



be laid down - it must tho' in fact be a  
reasonable and is a question of Law which Dimp.  
The Court may determine after a finding by a <sup>187</sup>  
jury - See a case in Burn: - When the in-  
dorser supposed himself liable to the indorsee  
and promised to pay the Bill when no  
notice had been given and action was brought  
upon the engagement and the Court rejected it  
for said they the indorsee had lost the bill  
before the engagement - here again ignorance  
legis exempt - As to notice upon the non accep-  
tance &c of an inland Bill of Exchange inde-  
pendent of a certain English Stat: no rule has  
obtained but the effect that notice has upon such  
bill is no other than to recover the contents of  
the Bill - In case of the non acceptance  
of a foreign bill of Exchange a method is poin-  
ted out by which notice is to be given and  
notice being given according to such method  
will entitle the holder of the Bill to the con-  
tents thereof and to his damages and costs &

The Statute as to inland bills has pointed out  
a similar method by which notice may be gi-  
-ven and notice given as the Law directs will  
secure to the holder his damages yet this Stat  
does not take away the Common Law method  
of giving notice it points out only to the holder  
a way to secure his damages & provided  
he will pursue this method. But as it  
respects this State the Law may be materially  
different between an inland bill and  
a foreign one and indeed our Orders are governed  
by the same principle that an inland bill  
of Exchange is governed by at Common Law  
only it is expected that in case of an order that  
the person in whose favour it is drawn will  
first pursue his remedy ag<sup>t</sup>. the Drawee  
provided he will not pay it - yet if it be appa-  
-rent that a suit ag<sup>t</sup>. him would be ineffectual  
on account of bankruptcy &c he is not obliged to  
pursue his remedy ag<sup>t</sup>. the Drawee but may



come directly ag<sup>t</sup>. the Drawer for in case he should institute an action ag<sup>t</sup>. the Drawee and ~~cancel~~ mutate a bill of cost the drawer is liable for it and therefore it is a favour to the Drawer that he be sued in the first instance — It has been made a question however whether any other evidence of bankruptcy could be admitted except a non est inventus — but the Courts have determined that other evidence may be admitted to prove his bankruptcy —

As to foreign bills of Exchange notice of non acceptance ~~it~~ must be given by a protest ~~and~~ ~~in~~ and it has been questioned whether any other notice than by a protest could be given. The old authorities seem to allow of other notice in which case however only the contents of the bill could be recovered: but the later authorities are decisive that no other notice except a protest will answer — The manner of this notice is thus — If the holder of the bill presents it for acceptance and the Drawee refuses to accept it he



must resort to the Notary-Publick who again presents the bill for acceptance and if it be refused a second time the Notary-Publick sets down the time of presenting it the non acceptance & then draws up a declaration which is called a protest declaring that he presented the bill at such a time which was refused - he then states in the bill that the holder intends to recover his damages &c from the Drawer or as the case may be from an indorser

When the protest is thus made out it must be sent to the Drawer by the holder the next post after the protest - the bill however is retained by the holder that he may again present it at the time of payment and when this arrives the same ceremony of protesting it for non ~~accept~~ ~~payment~~ payment must be gone over again as in case of non acceptance - in this case the bill itself is sent to the Drawer with the protest

Lex Mercat: 460 and in case the Drawer be afterwards sued by the holder the doings of the Notary-P: furnish complete evidence of a demand



So if the Drawee is not to be found a protest must be made out as above - So again if it be accepted variant from the tenour of the Bill the same ceremony must be repeated - and all this is done in order to lay a foundation for a recovery ag<sup>t</sup>. the Drawer &c

### Of a protest for better security

A protest for better security is where the drawee before the day of payment is about to abscond or become a bankrupt in which case the holder may present the bill for better security and give notice of P. Rec<sup>t</sup> it to the Drawer by application to the Notary. P. as 74<sup>3</sup> before mentioned

### Of the effect of a protest

The effect of a protest is to subject the Drawer or Indorser for the contents of the Bill together with damages and costs - As to the quantum of damages no general rule has obtained - the recovery of damages

However does not go on the ground that the holder  
has been prevented carrying on his merchandise &  
and in this manner sustained injury: but the  
rule as understood in this Country has been to give  
£20 on £100.

Lex  
Mer:  
451. The Cost in this case is a separate independ-  
ent charge from that of Damages and does not  
mean Cost of suit but barely the expenses which  
the holder has paid out &c.

It is a principle in the Law Merchant which  
extends to all contracts - that interest of the mo-  
ney shall be recovered up to the time of signing  
Burn: the judgment and not barely to the issuing of the  
1006. writ yet if there be a separate distinct security  
for the interest not dependant on the instrument  
upon which the contract is founded no more  
interest shall be recovered than to the date of  
the Writ.

### Of a supra protest

This is when the Drawer desires the bill to be



accepted on account of a third person in such  
case the Drawer must have notice of the 3<sup>d</sup>  
person's application - If the Drawer will <sup>Lex. 26</sup>  
not accept the bill as desired he may as any 450  
other person accept it for the honour of the  
drawer and in case the bill has been indor-  
sed over before it comes to the Drawee he may  
accept it for the honour of the indorser in which <sup>Lex. 26</sup>  
case the drawer is made liable with the indor 457  
sed but if he accepts for the honour of the  
Drawer it is a discharge of Indorser - If there  
be a refusal to accept by Supra protest notice  
must be given - so if the Drawee accepts for  
the honour of an Indorser notice must be given  
of such acceptance - so if it be accepted by another  
person for the honour of the drawer or indorser no  
notice is necessary to be given - If a Bill be accepted  
for the honour of the Drawer the acceptor becomes  
liable to all indorsees - but if it be accepted for the  
honour of an indorser he only becomes liable to  
the subsequent indorsees and the indorser in such

case and all prior indorsers including the Draw-  
er are rendered liable to the acceptor (Vide for  
much of this doctrine in Meaus Leg. Mer. 1437 onward)

Where a bill is accepted it furnishes prima facie  
evidence that the Drawee has the Drawers effects in  
his hands but this is not always the case - If how-  
ever he has effects in his hands and will not dis-  
Will: charge the bill he becomes liable to the Drawer for  
103: the contents of the Bill - If the Drawee has no ef-  
fects of the drawers in his hands no action lies against  
him for nonpayment - On the other hand the Drawee  
in all cases where he has not effects in his hands of  
Doubt: the Drawers and he discharges the Bill he may  
53: come upon the Drawer

It has been questioned whether the holder could  
discharge the acceptor from any liability by an  
express declaration of his; that he could as was formerly  
the case originated from a principle of the Common Law  
Doubt: that no declaration unless of as high a nature as the  
37: contract could discharge: but it is now settled that the  
37:



holder may discharge the acceptor by an express declaration but no particular indulgence of giving a length of time &c will amount to a discharge

If the holder after an acceptance by the Drawee receives part of the money of the acceptor the drawer is discharged from any liability for <sup>L. Ray</sup> 744  
it is giving suff. credit to the acceptor & and in <sup>Str:</sup> 745  
this case notice may be given without a protest

But in an action by the indorsee ag<sup>t</sup> the drawer or tho' the indorser has paid part of the money to the indorsee he may recover the whole sum in the Bill ag<sup>t</sup> the Drawer — It has been questioned whether the indorser could be charged without first resorting to the Drawer and the old authorities are that he cannot: but it is now settled that he may. <sup>L. Ray</sup> 443 <sup>Str:</sup> 441

Burr: 669 Of the remedy of the parties

It seems to have been a question whether a common law action of indebit. assump<sup>t</sup>: or debt would

lie ag<sup>t</sup>. Those who had rendered themselves liable  
to discharge the bill and there are contradictory  
authorities respecting it - some say the Drawer is  
liable in such an action and not the indorser &  
vice versa - The common mode however is to bring  
the action upon the bill according to the custom  
of Merchants yet if there is a debt existing be-  
tween the parties and at the same time a pri-  
-vity of contract between them it is settled that an  
action of indeb: assump: will lie as in the case  
between the drawer and Payee or the acceptor  
and payee: but as between a subsequent in-  
-dorse and drawer there can be no privity of  
contract - Formerly whoever br<sup>d</sup>. his action  
on the bill set out the custom and there stated  
the particular facts as that the Drawer did  
accept and refuse to pay & but the Law Merch<sup>t</sup>  
having become the law of the land no such me-  
thod obtains - It is now necessary to state the  
custom & but the gen<sup>l</sup> allegation is that the defend



become liable according to the custom of merchants  
and then state the facts as above — Suppose then  
an action is bro't by the payee ag't the acceptor it  
must be stated in the declaration that A for  
inst: drew the bill on B. in favour of C. that  
A delivered it to C. and that B accepted it  
these are the only necessary allegations to be  
stated — and it is to be remarked that it is not  
necessary to state that A the drawer subscri-  
bed his name to the bill tho' this is commonly  
done — It has been a question before the Courts  
whether it was necessary to state in the declaration  
that the acceptor accepted the bill according to the  
tenor of it and it was determined not necessary  
for it is immaterial to the Pl't how and in what  
manner he accepted it —

If the indorsee brings an action it is incum-  
bent on him to make the same statement  
and more — for after having stated the facts as  
above he must state in the case put that C  
endorsed the bill over to him in short he must

show himself to be the person pointed out by C. in order to receive the money and if there be a number of indorsees the last need not state the whole line of indorsements, but it is enough for him to state that he is the indorsee of C. who was the indorsee of D. who was the indorsee of E. &c. - And if the bill in the first instance was a blank indorsement by indorsements the last indorsee is at liberty to strike out the special indorsement and declare himself to be the indorsee of C. the blank indorser or he may if he elects state the special indorsement - It has been mentioned that the payee when he brings his action ag<sup>t</sup>. the drawer he must state a delivery from the drawer: but an indorsee need not state a delivery from the indorser for the indorsement is sufficient for him -

When the payee brings his action for nonpay-  
ment he must state notice to the drawer and the  
manner of that notice (viz. by protest) and if no  
notice be omitted in the declaration it is not cured by  
verdict and the rule laid down by 2 M. & L. Mansf.

Doug.  
654.



in the case cited in the margin respecting a Verdict  
curing defects in the declaration is as follows - says "  
Mornsfield - "That where the Pl<sup>t</sup> has stated his title "  
" or ground of action defectively or inaccurately (be- "  
" cause to entitle him to recover all circumstances "  
" necessary in form or substance to complete the title "  
" so imperfectly stated must be proved at the trial) "  
" it is a fair presumption after a verdict that they "  
" were proved; but that where the Pl<sup>t</sup> totally omits "  
" to state his title or cause of action it need not be "  
" proved at the trial and therefore there is no room "  
" for presumption" - When the drawee has no

effects of the Drawers in hands and has paid  
the bill he may bring an action of indeb: assump:  
against the Drawer and it is not necessary to state  
in the declaration that the defend<sup>t</sup> assumed &  
promised to pay provided all the facts are sta-  
ted which if proved will entitle the Pl<sup>t</sup> to recover

When a bill passes by delivery as if it be payable  
to bearer or if endorsed blank the holder tho' it has

2. May  
538  
J. H. H.  
120  
Carth.  
409

passed thro' a number of hands can bring ~~his~~  
his action ag<sup>t</sup> none but the Acceptor, Drawer and  
Indorser with a single exception - he may bring  
it ag<sup>t</sup> the person who last delivered it to him upon  
the privity of contract - but this action may  
be ~~not~~ met by shewing that the holder has  
not used due diligence to obtain payment from  
the indorser &c.

Where sundry actions are  
br<sup>o</sup>t ag<sup>t</sup> the persons made liable at the same  
time judgments may be had on all of them  
and if one be collected the others are discharged  
but as to the costs if one of the Defend<sup>ts</sup> will  
come in and pay up the debt and the cost  
which has arisen upon the other suits before  
judg<sup>t</sup> rendered the Court will stay proceedings  
upon them - So if several judg<sup>ts</sup> have  
been rendered and execution issued and one of  
them satisfied together with the cost upon the  
others the rest of the Defend<sup>ts</sup> will be entitled to  
their Audita Querele to stop the other executions



In an action ag<sup>t</sup>. the acceptor the handwriting  
of the Drawer need not be proved ~~but it is~~  
~~not~~ hence has arisen a general rule  
that the handwriting of the Drawer need never  
be proved, ~~but~~ but it is apprehended that the  
handwriting of the Drawer must be proved  
in an action br<sup>t</sup>. by payee for otherwise  
should the bill be forged the payee would  
take advantage of his own wrong; but in  
the other case tho' the bill be forged it is not  
necessary to prove the handwriting of the drawer  
y<sup>t</sup> to this there is an ~~and~~ exception if the  
bill be accepted before sight the handwriting  
of the Drawer must be proved for it is not  
known to the acceptor but that the bill was  
forged before it came to his hands.

When an action is brought by an indorsee  
ag<sup>t</sup>. the acceptor the acceptors handwriting  
must be proved and on this ground the hand  
writing of every indorser must be proved.



When there have been special endorsements  
If the action be by the indorsee against the  
drawer the hand writing of the ~~drawer~~  
indorser must both be proved and the indorsee must show that he has used due diligence to recover the money from the acceptor - he must also show that notice has been given to the Drawer of non payment &c

If the action be brought by the indorsee agt. the indorser the hand writing of ~~the~~  
~~no one~~ no one need be proved but the hand writing of the indorser for it is now in nature of a new bill yet he must show that he has used due diligence agt. the acceptor &c

Suppose the action is brought by the Drawer agt. the acceptor he must prove the hand writing of the acceptor - he must also prove a demand to have been made upon the acceptor and a refusal to pay in consequence of which he has had the money to pay himself: but he is not to prove that the drawer



had effects of his in his hands for this is on the part of the Drawee to shew by his answer and altho' the presumption is that Drawee has if facts of Drawers yet this presumption may be removed by proving the contrary —

If the drawee institute an action ag: the Drawer he must prove the hand writing of the drawer, that he accepted the bill and paid it and to recover he must prove that he had no effects of the Drawer in his hands for this the Law presumes till the contrary be proved but if the bill was accepted for the honour of the Drawer by another person no such presumption arises and the acceptor is not obliged to prove he had no effects of the Drawer — yet if the Drawer can prove that he had effects it destroys the right of action —

The evidence of the handwriting is derived more commonly from some confession of the party than from any other quarter it may be that



some person saw him draw the bill. So it may be proved by any circumstances of behaviour that cannot be accounted for without supposing he drew the Bill.

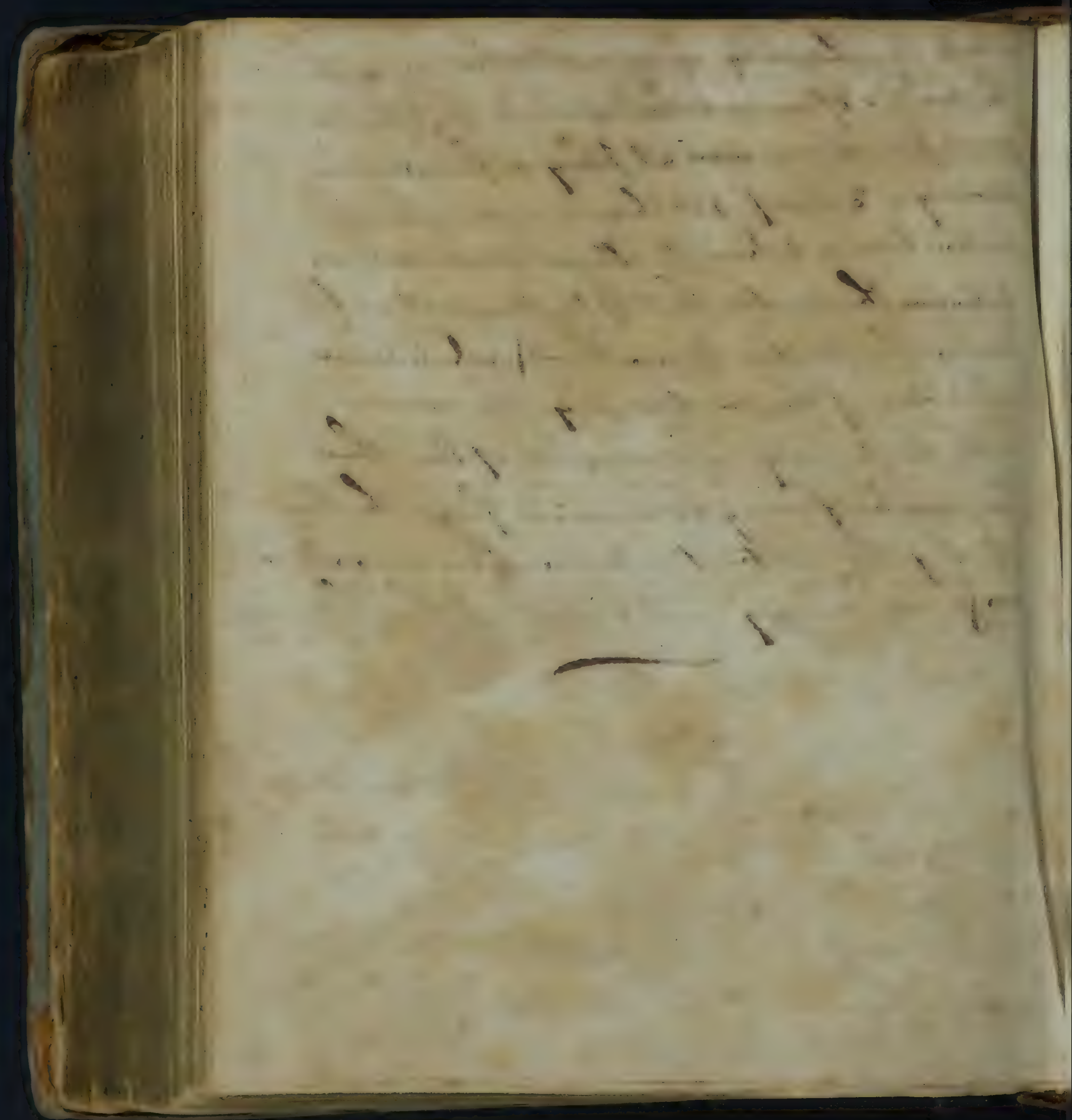
### Of the defences.

The drawer may set up forgery for a defence but he shall not be admitted to prove the forgery by a similitude of hands, but where the proof comes from a confession it must be by the party then to be charged for the ~~conf~~ confession of another cannot be admitted for inst: and indorsee sees an acceptor he must prove the indorsement of payee and the confession of payee is not admissible.

If the defence be for want of a consideration, the illegality of it may always be enquired into as betwixt the immediate parties but when once removed from them and the bill has become negotiable the illegality of the consideration is no defence generally - There are two cases however in



which the illegality may be attached even in  
the hands of an indorsee as where the bill was  
given for money won at play or for usurious  
money - 3 Duff. 410 There is a case where a  
distinction is taken to illegal considerations  
between the parties that if the transaction be  
between the parties be *malum prohibitum*  
and one of the parties pays the money  
with the privity and consent of the other  
the one half may be recovered from the other  
but if the contract or transaction was *malum*  
*in se* no recovery could be had ag<sup>t</sup>. the other





# Of Policies of Insurance

A policy of Insurance exists by a custom which obtains in the Mercantile world - in where a person engages property on the sea &c - he may resort to an insurance office and there procure an insurance of his property Vessel &c. This is done by advancing a premium to the insurer according to the terms agreed on, in case &c. This being done if the vessel &c be lost or meet with any accident the insurer must make it up - This contract is reduced to writing and called the policy - This mode of insurance is commonly done by one man - But there may be an insurance by many underwriters - This is done by drawing the policy and procuring persons to underwrite each specifying the sum he is willing to insure and taking <sup>2</sup> Shares his proportion of the premium accordingly - The premium given may exceed all rate of interest and yet is not accounted repay on the ground of the hazard run.



11  
This contract commonly relates to ships & yet  
it is sometimes applicable to other mat-  
ters tho' governed by the same Law with  
some little ~~var~~ variation - As for Inst. lives  
may be insured and there is no principle in  
the common Law that opposes this idea for it  
is no more than a wager and as wagers at  
com. Law are allowable so were such insur-  
ances - But by a Stat: of George 3.<sup>d</sup> such in-  
surances are restrained and rendered void un-  
less the insured has some interest in the  
life insured - As this question has never  
been settled in this country it may be ques-  
tioned whether the Com. Law of Eng.<sup>d</sup> as it  
respects such kind of wagering can be ad-  
mitted as our law? The Eng. Com. Law is in-  
deed evidence what our Law is but it ought  
not to become our law untill admitted by  
our Courts or unless they think it the best  
for the publick weal - besides this has grown  
into common law from precedent and  
not from principle for it comes within  
an established rule at Common Law



"that all contracts which militate against sound policy are void" and it cannot be denied that a wagering contract is ag<sup>t</sup> sound policy and indeed Judge Miller in a case reported in <sup>Dun</sup> said that this doctrine could not be supported upon principle &c —

### Of Insurance ag<sup>t</sup> Fire

This is not strictly a mercantile transaction nor is it governed entirely by the mercantile law yet it has always been considered that the party must have an interest in the property insured at the time of insurance and at the time of the accident, for if the interest be determined before the ~~and~~ accident the policy is at an end as if A insure the house of B. for a certain time and B soon after sells the house to C. and before the time has elapsed the house is burnt C. cannot avail himself of the insurance to B. for the policy ended immediately upon B's leaving the house — The nature of such a policy is such that it can never be assigned over to a third person

In these policies there is always a provision that the insurer shall not be liable if burnt by invasion <sup>2 Will</sup> 363

of enemies or any usurped power whatever: but this  
has been construed not to extend to a mob - that if a  
mob should burn a house insured the insurer would  
be liable. it must therefore mean, people in arms or  
rising in rebellion and exercising de facto a  
power -

3 Burr. 1905. Ports, Arsenals, Magazines & cannon  
be insured as has been determined

It is said that a policy may be explained by a  
parol agreement and Salk. 44 it cited in support  
of it - But there is another authority in Shenners  
Repts. in which parol proof was rejected it being  
inadmissible to explain a policy - so that it may  
be considered as an unsettled point - to admit  
it however would oppose the principles of the  
Comm. Law -

The term at and from a place have  
been construed to extend to the vessel while lying  
in the port and if she be laden ready to sail  
but while lying in the harbour she be lost the  
insurer becomes liable, for his liability com-  
mences immediately after the completion of the  
insurance - Yet it if the voyage was said



aside and all idea of pursuing it abandoned  
the insurer would not be liable but so long as, <sup>2<sup>lth</sup></sup>  
the voyage is in contemplation the insurers <sup>350</sup>  
liability continues - An insurance of ship and <sup>359</sup>  
freight does not include freight that would have <sup>fr:</sup>  
been earned had the ship not been destroyed be- <sup>1251</sup>  
fore she sailed, unless the goods were actually on  
board for till then the <sup>W<sup>th</sup></sup> right to freight does  
not commence -

By Stat: all wagering policies are void but if  
a person has lent money on a bottomry bond <sup>38</sup>  
he may insure, in which case it must be so ex <sup>1394</sup>  
pressed in the policy: The condition of this bond  
is that if the ship returns he is entitled to his  
money if not he loses it -

If a vessel that is insured be injured or greatly  
arranged in some instances the insured may enter  
for a total loss, viz, he may abandon the vessel  
and sue upon the policy while in other instanc-  
es he can only enter for a partial loss - If the  
vessel be totally lost there can be no question but  
insurer is liable for the whole loss: but it may be

that the vessel has been taken and retaken  
stranded or a part of the cargo lost and as a good  
Gen<sup>d</sup> rule if the salvage in such cases falls short  
of the freight the insurer may enter for a total  
loss but in this case the insurer is entitled to the  
whole of the salvage provided he has made satis-  
faction to the insured and stands in his place and  
is entitled to prizes &c. No instance however can be  
found in which the insured are obliged to abandon  
unless in a total loss but they may declare as for  
a partial loss - If a ship be ~~the~~ taken and retaken  
and condemned to be sold and a moiety paid  
to the recaptors the insured may recover as for  
a total loss upon relinquishing the salvage

If a privateer be taken and retaken and the  
owners appear and give bond to pay to the cap-  
tors &c and she be sent back to be delivered to the  
owners the insured may still enter for a total  
loss - But if a merchant ship be taken and  
retaken the insured cannot abandon and recover  
for a total loss unless he do it before the ship ar-  
rives at her port of delivery but ~~can~~ can only



abandon for a partial Loss - so that there appears  
to be a difference between a Merchant ship and  
privateer - It is therefore apprehended that the true  
rule to be drawn from the cases is this - That  
when a ship has been taken and retaken and  
arrived in port and no material damage is  
done to the cargo the insured can only enter for  
a partial loss but when the damage has been  
truly considerable and ransom &c paid the  
insured may enter for a total loss

Fraud of any kind vacates a policy not  
only positive false affirmations but the con-  
cealment of a material fact which in good  
consequence ought to be revealed - as when the <sup>He:</sup> 110.  
ship at the time of insurance was leaky which  
fact the insured concealed - So when the agreement  
was with the first underwriter that he should not  
be bound by the policy in order to obtain other <sup>313.</sup> 13.  
underwriters - This was held fraudulent - but the <sup>61.</sup> -  
not disclosing a man's own speculations will <sup>190.</sup>  
not vacate the policy - The terms used in the  
policy are Lost or not Lost and it seems to be  
necessary that these be inserted for should they be

omitted and the ship lost at the time of insurance  
the ~~ins~~ insurer would not be liable

When the policy is a fraudulent one it ~~must~~  
~~cannot~~ be returned and the premium given  
tho' at Com: Law it is otherwise

When the ship is lost by the misconduct of the owner,  
master, pilot, or mariners the insurer is  
not liable - So a deviation from the voyage  
specified in the policy unless it be compulsory  
will vacate the policy but a clear intention  
only to deviate will not vacate the policy and  
tho' if the ship be lost before she arrives at the devi-  
269 ding ~~point~~ point the insurer is liable -

In this policy there is always an indemnifi-  
cation ag. thieves and robbers - but the con-  
struction of this does not extend to private pil-  
lagers as by the mariners or one stealing in a  
private character - but it must be by publick thieves  
making it their business &c as pirates &c

If a ship and cargo be insured generally with-  
out specifying the value and they are lost the  
underwriters are all equally liable and if more are  
subscribed than the value they are liable pro rata



But if the policy ascertaining the value the  
underwriters who subscribed after the whole value  
was subscribed by others are not liable and must  
return the premium for it being in the nature <sup>But</sup> 439  
of a double insurance which the law will not  
admit, the last underwriters cannot retain  
their premium - yet if the insured find the  
insurers capable of paying it is <sup>not</sup> a double  
insurance, but the last are holders - and the  
authority in Bur: goes upon the ground  
that when a vessel has been twice insured tho'  
the insured cannot sue both insurers and re-  
cover his money twice yet when he has recover-  
ed it of one the same one shall stand in the  
insured's place and recover a moiety from  
the other - It is common for a policy to contain  
these words "warranted to depart with convoy" and 4<sup>th</sup> Me.  
if this is not complied with the policy is discharged 60  
and by the construction put upon these words 3 Lev.  
by the Courts the vessel must go the whole voyage 321  
with convoy altho' the departure be not within 443  
voy yet it is sufficient if it be taken at the Str.  
72 65

usual place, as if the vessel sail from  
Hull to the Downs &c

After having departed with  
Convey, an unnecessary separation,  
as to fight &c, is a discharge - but  
if the separation be necessary, as on acc-  
-ount of tempest &c it is no discharge  
of the policy -

It is also common for the  
policy to contain these words "till dis-  
-charged from her voyage" and it  
has been construed to be a discharge  
of the Insurer, provided the owner of  
the goods take them from the vessel  
in a Lighter & before they arrive at  
the shore, are lost - but if the goods  
were sent in the ship's boat the  
Insurer is liable - The case  
cited in Burrough is a case in which  
the rule is laid down, with regard to  
Captors - "that a capture enables

St. 1236  
2<sup>d</sup> Bur.  
683



the insured to abandon. But if the capture was on by a small hindrance, as if there was a sudden escape or an immediate ransom &c, he cannot abandon only for a partial loss - tho. an insurance ag<sup>st</sup>. the perils of the sea or thieves &c does not subject the insurers, where the vessel is lost or injured thro. the mismanagement or felony of the Master - yet when the insurance is ag<sup>st</sup>. the barratry of the master, as fraud &c by running away with the vessel, squandering the property or embegging it, then are the Insurers liable. or if he deviate from the voyage, from his own intention and not by order of the owners, the Insurer is liable - but if Str. 1264 this deviation be by compulsion of the 1249 Sailors, it is not barratry, and the insurers are not liable - so a mere negligence of the master is not considered as barratry.

If the insurance be ag<sup>st</sup>. Embargoes and restraints of Princes, it does not extend to

Str. 1264  
1249  
127

seizure for disobedience of the Law as  
for running goods &c

Where the risk is not run the prem-  
666 666-ium must be returned but if the  
risk has once begun to run, there is  
no return of the premium

2<sup>d</sup> 1304. It is sometimes the case that a part  
1237 of the premium must be returned -  
this happens where two premiums  
are given upon the same contract and  
the risk is run upon one part and  
not the other as where a vessel is  
insured to the downs, and a premium  
given and then another premium  
given to insure to the west-indies -  
the vessel sails to the downs but  
by some means or other she does not  
proceed on her voyage to the Indies  
in such case the premium given for  
the insurance to the Indies must be  
given up

3<sup>d</sup> 1304.  
1905

If there be any fraud in the



Insurer - as if he insure when he knows  
the vessel has returned. he must return the  
premium - but it has never been supposed  
to be paid in the insured, if he has heard  
of the vessel's being spoken by another  
and does not inform the Insured -

When a Ship that has been insured  
is lost at sea, the insured may recover -  
And 4 years un heard of is sufficient <sup>Pr.</sup>  
proof of a loss - but if the Ship after <sup>1199</sup>  
wards arrive in port, the Insurer may  
recover back the money paid -

## Of a Charter party

This is where a vessel is hired to carry  
merchandise, and the reward is called  
the freight - A vessel may be hired for  
so much per month or so much for the  
whole voyage, or so much for the outward  
& so much for the inward voyage -

If the Ship perish the freight is lost -  
the owner loses his ship & freight and  
the freighted his goods - But where it  
is so much for outward and so much for  
the inward voyage, and the ship is lost  
performs the outward and is lost on the  
inward voyage, the freight on the out-  
ward voyage must be paid - but if by  
the terms of the contract no freight is to  
be paid untill the return of the ship.  
and she be lost on her return, the outward  
as well as the inward freight is lost -

<sup>1<sup>st</sup> Sec.</sup>  
206 If the Master return without lading  
yet he shall be paid, where it was owing to  
the Merchant or Factor, that she returned  
empty - And it is a rule in the mercantile  
Law, that the master has a lien on the  
goods for his freight -

<sup>2<sup>d</sup> Sec.</sup>  
883 Where the ship is not lost, but the  
goods are damaged, the owner may aban-  
don the goods & recover their value - but



if he take the goods he must pay the freight, and he cannot separate the undamaged from the damaged, and abandon those that are damaged, but if he take any part he must take the whole - and if he abandon the goods they become the masters -

If the Ship is disabled or taken when part of the voyage is performed, the master shall have freight pro rata - and <sup>th.</sup> 6 <sup>Mod.</sup> he has power to borrow money & hypothecate the Ship - and the Lender has the security of the Ship - and the owner & 55 - master are personally liable for the money -

If the master takes up money for the refitting or victualing the Ship the owner is liable for it, altho the Ship was leased to the master - The owners are also <sup>Carthw.</sup> 58 <sup>Salt.</sup> liable for the misconduct of the master, <sup>440</sup> as if he squander the goods &c - and the <sup>3. Mod.</sup> 322 master is also liable to the owners - and <sup>quar in</sup> 592 <sup>Baw</sup> it is said in some of the books, that the master loses his ~~own~~ wages - but it is <sup>alt.</sup> <sup>by Stat.</sup>

apprehended, this is not the case no  
farther than to answer damages &c

## Of merchant & Factor

A Factor is a person who is employed  
to transact the business of his merchant  
or employer for which he is paid according  
to the nature of the contract - This Factor  
takes a commission in writing - and if  
the commission empowers him to deal  
with the goods as his own he may sell  
them on credit provided the time of credit  
be not an unreasonable time, - that is,  
beyond the usual time of credit - and if  
the goods are lost when thus sold, it is  
the loss of the merchant and not of the  
Factor - If the commission be to sell &  
dispose of generally, he has no authority to  
sell on credit - even if the goods are bona  
fide

It is the nature of this undertaking by



The Factor, that after he has received his commission &c. he must account for the goods he has received - to effect this an action of account is the only legal remedy for the merchant - but this action is now dispensed with, and an application in Chan'y. substituted, as being a matter of more convenience - but if the goods were lost or stolen &c. it is a complete defence to the Factor - he also has a lien on the goods in his hands, and may retain them till satisfied for his undertaking - he likewise has his remedy ag<sup>st</sup>. the Merchant and the lien upon the property in his hands is good ag<sup>st</sup>. Creditors &c. - In this respect the Factor is not considered as a Bailie at all events -

In this state we have not ordinarily applied in Chan'y. to call the Factor to an account - but have avoided it by other actions, which are concurrent with account - as indebitatus assumpsit &c. -

If a Factor undertakes to run goods & they are seized, he must account for them, and cannot plead the seizure in defence — Should a foreign Factor run goods which are not seized and in this manner avoid paying the duties, he shall be allowed the duties in accounting upon a suit in Equity — but should this be done by a home-Factor, he would not be allowed the duties, because this would be curtailing their own revenue —

It is a question whether the Principal shall be liable for the fraud of his Factor, civiliter? the current of authorities are, that he shall be liable for all the damage done by his Factor and there appears to Gr. fac. be but one authority that opposes this 469. idea — and that a very strong one, hardly to be reconciled —

If a Factor sells the goods of his mer.<sup>t</sup>. and vests the money in other goods, and then dies, the goods so purchased are the merchant's and not subject to the debts



of the Factor for it has been determined,  
that the vesting the money in other goods  
does not change the property, it being for  
the benefit of trade - but if the Factor Salh.  
had not vested the money in other goods, & 160  
had died, the money would be subjected to the  
payment of the Factor's debts - on no other  
ground it is apprehended, than that the  
money of the merchant cannot be disting-  
-uished from that of the Factor -

If a Factor sell goods on credit without  
any authority, yet the sale binds the Mer-  
chant for as between the Factor & Vendee, the trans-  
action is bona fide - and the Merchant must  
look to his Factor for reparation - yet if these st.  
goods were pledged by the Factor to secure 1178  
his own debt, the Pledgee cannot retain the  
goods in defiance of the merchant -

When the Factor ~~undertakes~~ <sup>undertakes</sup> to sell  
goods on credit, the Vendee becomes Debtor  
to the merchant and not the Factor - but a  
payment to the Factor is well made, unless



The merchant particularly forbade the  
Vendee to pay the Factor - in such case  
if the Vendee pays the Factor he pays it  
in his own wrong.

In some places there is a custom that  
the Factor, when he sells goods shall run  
all risk of a loss - in such case he may  
sell on credit - a question arises here,  
whether the Vendee is Debtor to the mer<sup>t</sup>  
or Factor - or whether the Vendee is liable  
1182- to the mer<sup>t</sup> after being forbidden to pay  
to the Factor - this question appears not  
yet to be settled, for the case in Strange  
was only a determination by the Jury  
contrary to the opinion of the Court.  
The Verdict of a jury composed of  
merchants is at least strong evidence  
of a custom.

### Of mariners

If the mariners do any damage by  
embezzling property &c. the master and



owners are liable to make up  
the loss to the injured party

A rule obtains with regard to Mariners <sup>P.D. May</sup>  
"that if the Ship is lost by storm or taken <sup>396</sup>  
in by Pirates, or the mariners run <sup>650</sup>  
away, they in all such cases they lose  
their wages

The law has made particular prov- <sup>st. Ven.</sup>  
-ision for mariners to get at their wages <sup>146</sup>  
when due. - they may all join in one action <sup>P.D. May.</sup>  
at the Court of Admiralty - and they <sup>1206</sup>  
may do this notwithstanding they let  
themselves by a written contract on Land

they have also the security of the master  
and owners - The master has not  
this privilege for he cannot sue for his <sup>P.D. May.</sup>  
wages in the Court of Admiralty. <sup>576</sup>  
neither can his personal representative  
in case he die upon the voyage

Certain rules seem to have obtained with regard to throwing property overboard &

If part of the property be thrown over to save the rest - the master, Owners, Freighters & Passengers must all contribute to make up the loss - Passengers are to contribute according to the property they have on board - So if the goods on board are injured in lig. - saving the vessel &c an average must be made - If the goods however, do not save the rest, there can be no average - or if they be not lost but given to Pirates to save the rest, an average is to be made - but if Pirates take the goods by force, there shall be no average - as where



a ship loaded with oil & silk - was  
chased into port and the oil taken &  
the silk untouched - it was held the owner  
of the ~~ship~~ <sup>with</sup> should not contribute to the  
owner of the oil -

When a Vessel is taken the master <sup>Gates</sup>  
may ransom her - in which case he has <sup>vs</sup>  
the security of the Owners for the ransom - <sup>Hall</sup>  
or if unable to pay the ransom - he may <sup>michl.</sup>  
pledge himself or any one of the mariners <sup>term</sup>  
provided he is willing to be pledged. and it <sup>26.</sup>  
is the duty of the Owners to redeem them - <sup>Geo. 3.</sup>  
Of the right of merchants to stop goods sold  
in transitu -

The Consignor may stop goods sold in <sup>2 Qu.</sup>  
transitu before they get into the hands of <sup>inf.</sup> the  
the Consignee in case the Consignee be inso-  
lvent - but if the Consignee assign the  
<sup>trade</sup> ~~goods~~ of lading to a third person for a  
valuable consideration, the right of the  
Consignor, as ag<sup>st</sup>. such assignee is divi-  
-ded - This principle of the Law-merchant  
is variant from the Com. Law; for by that law  
if the goods are once sold they cannot be taken



unless by attachment — — —  
Of the Owners —

Where there are a number of owners to a ship she is to be regulated by the major-part - if therefore the major-part agree to send the vessel to sea and the minor-part disagree thereto - upon the major-part's giving security in the Admiralty to secure to the minority their shares, the ship may sail - and in this case the minority can have no share of the profits - but if the majority send the vessel without giving this security, the minority are entitled to profits - and if the vessel be lost the minority lose their shares — — —

If the majority disagree to the voyage the minority cannot compel a voyage - but may compel a sale of the vessel - so this may be done when part-owners become unable to fit out the ship &c — —



If the master of the ship take goods to  
carry for hire, and he be robbed in port under Vent.  
the dominion of the Com. Law, he is considered 190  
as a Com. Carrier and as such liable at 238  
all events - but if on the sea where the ~~mar~~ 918  
mercantile-Law prevails he is not liable.

If a freighted ship be disabled by acc- 2. Bur.  
-ident and not by the fault of the mas<sup>r</sup> 882  
he may refit her if he can do it in a con- 888  
-venient time - if not he may freight anot-  
-her and the freight shall be paid him.

A policy must be made agreeable 1. 1. 1.  
to the label or agreement 545

If a ship be insured ag<sup>st</sup> neutral- 3. Bur.  
-property and she be shipwrecked and no 1419-  
neutral-property on board. the Insurer is  
not liable ~ ~ ~ ~ ~

### Miscellaneous principles

1. See a case in Durnford which may 2. D.  
serve to elucidate the question, whether 758  
an unfair non est invention by the Officer  
is conclusive ag<sup>st</sup> the Bail ~ ~ ~

The case was thus; an Officer had served  
a scire-facias upon the Principal so near  
the sitting of the Court, that there was not  
sufficient time to surrender up the body  
and in an action ag<sup>st</sup>. the Bail, the  
Court said that was a sufficient defense -

2<sup>d</sup>. Where money has been paid upon an  
illegal consideration and an action bro<sup>t</sup>. to  
recover it back, the illegality of the  
consideration cannot always be sufficient  
evidence to prevent a recovery by the T<sup>th</sup>.  
as when the parties are in pari delictis

as in gaming &c  
3<sup>d</sup>. Whomever purchases of a person & gives  
a full price ag<sup>st</sup>. whom there is a judgt.  
which is known to the Vender, the purchase  
is fraudulent and void

4<sup>th</sup>. Foreign laws must be proved as facts, Cow. 174

5<sup>th</sup>. It is a rule where one of two innocent per-  
sons must suffer, that the person who

entitled the third person to do the wrong  
must suffer - The case however, of Hoare  
and Harton and all similar cases, is



manifestly an exception to this rule - this doctrine is opposed to the cases of fraud and fraudulent theft -

6<sup>th</sup>. Of Witnesses being Credible at the time of attesting an instrument, which appears not yet to be settled - Str-1253 & 1301. 414

9<sup>th</sup>. our Stat. does not contemplate the giving an execution on money - but see a Doug. case in Doug 105. where a motion was made to retain money in the hands of the officer and the Ct. granted it - 219-

## Lectures upon the Statutes of Connecticut including principles of Com. Law &c.

The first Statute is merely a declaration of the security of the rights of the people that no man's life shall be taken away, his honour or good name stained, his person arrested, restrained &c. his goods &c taken away from him or damaged under colour of law &c unless clearly warranted by the laws of



This state - no man or person shall  
be restrained &c by any authority, before  
the law hath sentenced him therunto if  
he will give sufficient bail &c for his  
appearance &c unless it be for capital  
crimes, committed in open Court, or unless  
excused by some express law, which must  
mean some Stat. Law -

An Act relating to abatement &  
amendment of Writs, reversal of judt. &c.

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For abatements, amendments &c see Vol.  
3. 11 and also vol. 2. for the purpose  
of ascertaining in what cases the Ex<sup>r</sup> may  
prosecute a suit &c -

This Stat. in attestation of the Com. law,  
declares, " that where there are two or more  
" Pl<sup>t</sup>s or Def<sup>t</sup>s and one die pending the  
" suit, the cause shall not abate, if the cause  
" of action would survive to the surviving  
" Pl<sup>t</sup> or Def<sup>t</sup>. the death being suggested



upon the record the action shall proceed.  
If a Deft. appeal from a judt. given on  
pleas of abatement and shall not make good  
his plea, by the judt. of that Ct. to which  
he appeals, such Court shall award the costs  
ag<sup>st</sup> him, however the case may finally issue.  
if therefore a Deft. appeal and his plea be  
overruled, and he afterwards plead full pay-  
ment and recover, still he shall be subject  
to the cost that arose upon the appeal.

an act relating to the age, ability  
and capacity of persons

All persons of the age of 21 years of right  
understanding & memory, whether excommunicated  
or other (not otherwise legally incapable) shall  
have full power and liberty to make their  
wills &c — the clause "no otherwise legally  
incapable" came to be inserted in the Stat.  
by reason of the great disturbance made at  
the time, the great question was agitated,  
"whether a Feme-Covert could devise away  
her real estate, which is treated of in the 5<sup>th</sup>  
Vol. page — This clause however, means



nothing more than common-law in-  
-facilities, which were contemplated by the  
Legislature at the time of making the  
Statute —

Persons at 14 years of age may  
convey away their personal estate, chuse  
Guardians at 14 in males & 12 in Females.  
and in Eng<sup>d</sup>. a period seems to be  
pitched upon when a person is capable of  
slandering, which period appears not yet  
to be adopted in this Country, —

This Stat. to prevent perpetuities,  
has declared, "that no estate shall be given  
by Deed or will to any person or persons  
but such as are in being, or to the immediate  
issue or descendants of such as are in being  
at the time of making such deed or Will, —  
and that all estates given in tail, shall be  
and remain an absolute estate in fee-  
simple to the issue of the first Donee in  
tail — so that A may give an estate tail



to the issue of the youngest Child of B.

It appears clearly to have been the intention of the Legislature in making this Stat. to effect by Deed, what in Eng<sup>d</sup>. is effected by an executory devise, and it seems to have had the desired effect - And the principles of an executory devise will be found generally to apply to our Stat. of entailment -

### An act regulating civil actions

This Stat. is a local regulation and the principles unknown to the common law -

The modes of process under this Stat. are two - a Summons & an attachment - A summons is a writ in which is included the declaration, signed by an authority and directed to some officer whose duty it is to give notice to the Def<sup>t</sup>. that he appear before the Court named in the writ &c. The Officer by virtue of this writ cannot take either the goods or body of the Def<sup>t</sup>. he has only to give notice which is done either by reading the Writ to the person of the Def<sup>t</sup>.

or by reading a true and attested copy at  
his last usual place of abode — — —

An attachment differs from a summons  
only in this respect — its object is to  
secure to the ~~D~~ <sup>Plt.</sup> his demand — the  
Officer therefore is to attach the goods or  
estate of the ~~Def.~~ and for want thereof his  
body — this mode of attaching property is  
unknown to the common-law — yet in  
Eng<sup>d</sup>. it is a custom in particular places  
to attach property — but the principle of  
the common-law is, that the body only  
shall be attached — This Stat. then is  
clearly an improvement upon the Com. law.

The property thus attached is for  
the purpose of responding the judgment  
of the Court and serves two very valuable  
purposes, the one for the benefit of the  
Creditor in securing to him his debt, the  
other for the benefit of the Debtor in  
securing his body from arrest — and if



the property be attached from motives of ill-will, when the Debt. is abundantly able to discharge the debt, it may be replevied, upon giving security and if unable to give security, the attachment secures the debt, which otherwise might have been lost -

The body in this case can never be attached provided the Debt. will turn out property sufficient to answer the demand. This is warranted from the nature of the process, which is "to take the goods or estate of the Debt. and for want thereof his body" yet the officer is not precluded from attaching the body of the Debt. altho there be estate sufficient to answer the demand, provided the Debt. will not turn out such estate, or it is not known by the officer to be the property of the Debt. - but the officer in such case is warranted to take the body - if the officer however will take the body, when he might have taken property, when it was well known to him that there was property sufficient to respond the debt, and the Debtor afterwards becomes a



Bankrupt, the Officer will be liable to the Creditor for the damage he has sustained in consequence of the Officer's misconduct - but if the Debtor be under any suspicious circumstances, as if he be a poor man and it is not known to the Officer that the Cattle &c in the yard of the debtor are not his own Cattle, he is not compelled to attach such property at all events, but does perfectly right in taking the body, and in event will not be liable to the Creditor -

There is a certain species of property that is exempt from the attachment, which the Officer has no power to meddle with - such things as are necessary to uphold life - as tools &c - a Cow and ten sheep are always exempt - yet if the Debtor will turn out such property to save his body from arrest, it may be taken by the Officer, and when taken may be



levied upon by the execution

When the Officer has taken the body of the Debtor, he may release it & take property - but he cannot release property and take the body - nay the Debtor may compel the Officer to release his body upon turning him out property - this point has been determined by the Court of errors -

yet when the Debtor says to the Officer when he is about to attach certain property "that is not my property" in consequence of which the officer attaches the body and takes it to Goal - but before it is committed, the Debtor tells the Officer, that such was his property and commands the Officer to release him & take the property, which the Officer refuses and commits him to Goal. he is not liable to a suit by the Debtor - this has been determined by the Sup<sup>r</sup> Court in a case which came before them in the County of N. Haven

The form of the attachment, is to ~~attach~~

attach the goods or estate - in the construction of this, the Courts have determined, that the word "estate" does not mean real-estate but personal only - and if the Officer cannot find personal estate he has his election to attach the Land or the Body of the Deft. -

So when the Officer has taken one kind of personal property, he may release it, and take other - as if he has taken an horse, which he thinks will not satisfy the demand, he may release the horse & take other & -

This Stat. directs the process to the Sheriff, his Deputy or some Constable and if such Officers cannot be had without great charge and inconvenience, the Authority, signing the writ may direct it to an indifferent person, by inserting the name of the indifferent person and the reason of the direction - the Courts in this case have declared, that it is sufficient, for the authority of him to insert the words of the Statute -



" whereas an officer cannot be had without great charge and inconvenience, and thus have lodged in the breast of the justice &c. the exclusive right of determining what shall be a reason

If the writ be returnable before the County - Court, the Deft. shall have twelve days notice - if before a justice 6 days - and all writs returnable to the County - Court shall be returned one day before the sitting of the Court - to be entered in the Clerk's DoCKET

The Stat. directs that the property be attached - but the Courts have determined, that altho. property be not attached, yet if the process has been served, it is no cause of abatement; for say they it does not lie in the mouth of the debtor to come into Court and say "you" Plt. have not handled me with a rough and heavy hand - you ought to have attached my property as the law directs - but as it respects the Plt. the law is materially different - he is at liberty to treat the doings of the

The officer as negatory and may sit down  
and issue another attachment ag<sup>t</sup> the  
Officer as having conducted wrong fully, and in  
this manner secure his debt

If the Def<sup>t</sup>. lies out of the State  
or happens to be out when the process is  
served and does not return before the first  
day of the Court's sitting, the suit shall  
be continued to the next session - and  
if notice could not probably be conveyed to  
him pending the suit, it shall again be  
continued to the next Court & no longer -  
but jud<sup>t</sup>. rendered &c. - see the Stat. -

In actions on joint contracts, service on  
those within the state is good ag<sup>t</sup> all - yet  
if any one of the Def<sup>t</sup>. on whom the process  
was not served is aggrieved by the jud<sup>t</sup>.  
he may be relieved by an audito querela -

The Pl<sup>t</sup>. may withdraw his action at  
any time before jud<sup>t</sup>. rendered, in which case  
he is at liberty to institute a new action -  
but if he be nonsuited, he is precluded from



entering a new suit and shall be subject to  
the cost &c - so that a retraxit in this  
State operates differently from a retraxit in  
an Eng<sup>h</sup>. Court - for by the Eng<sup>h</sup>. law, a  
retraxit is a complete bar to another action -

It is to be remarked however, that when  
the Pl<sup>t</sup>. enters a retraxit - he must give notice  
to the Opposite party, that they may enter  
for cost -

If a bill be brought in which the title  
of land is to be tried, it shall be brought  
in the County in which the Land lies, and  
it is immaterial where the Pl<sup>t</sup>. or Def<sup>t</sup>.  
lives. The only enquiry is, in what County  
does the Land lie? - This may make  
an important question before the Circuit-  
Court, who are stationary and are to deter-  
mine according to the law of each State -

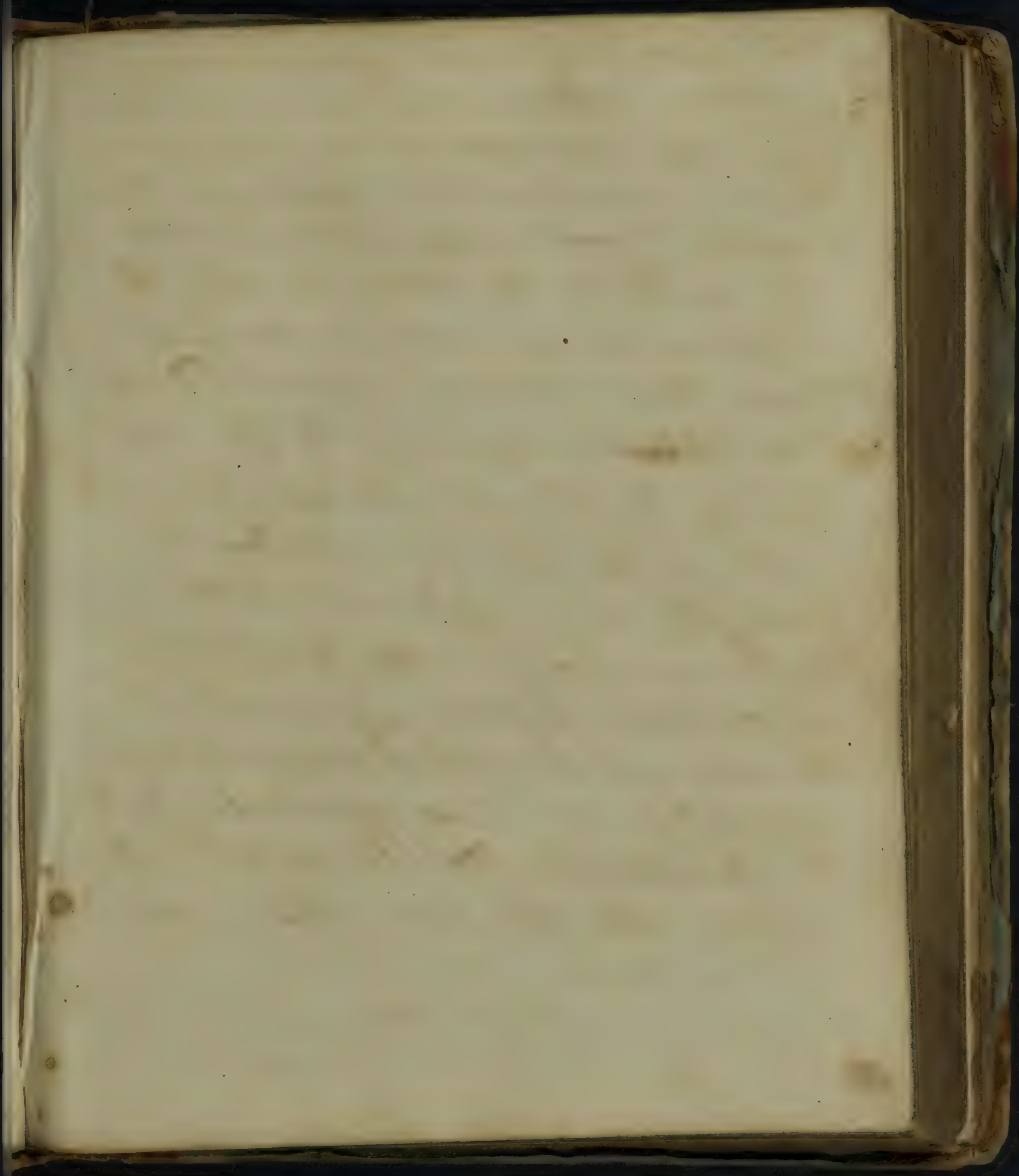
It is apprehended however, that the <sup>new</sup> ~~re-~~  
judiciary bill is a virtual repeal of that  
clause of the Stat. which empowers this  
Court to try causes between an inhabitant  
of one State & an inhabitant of another -

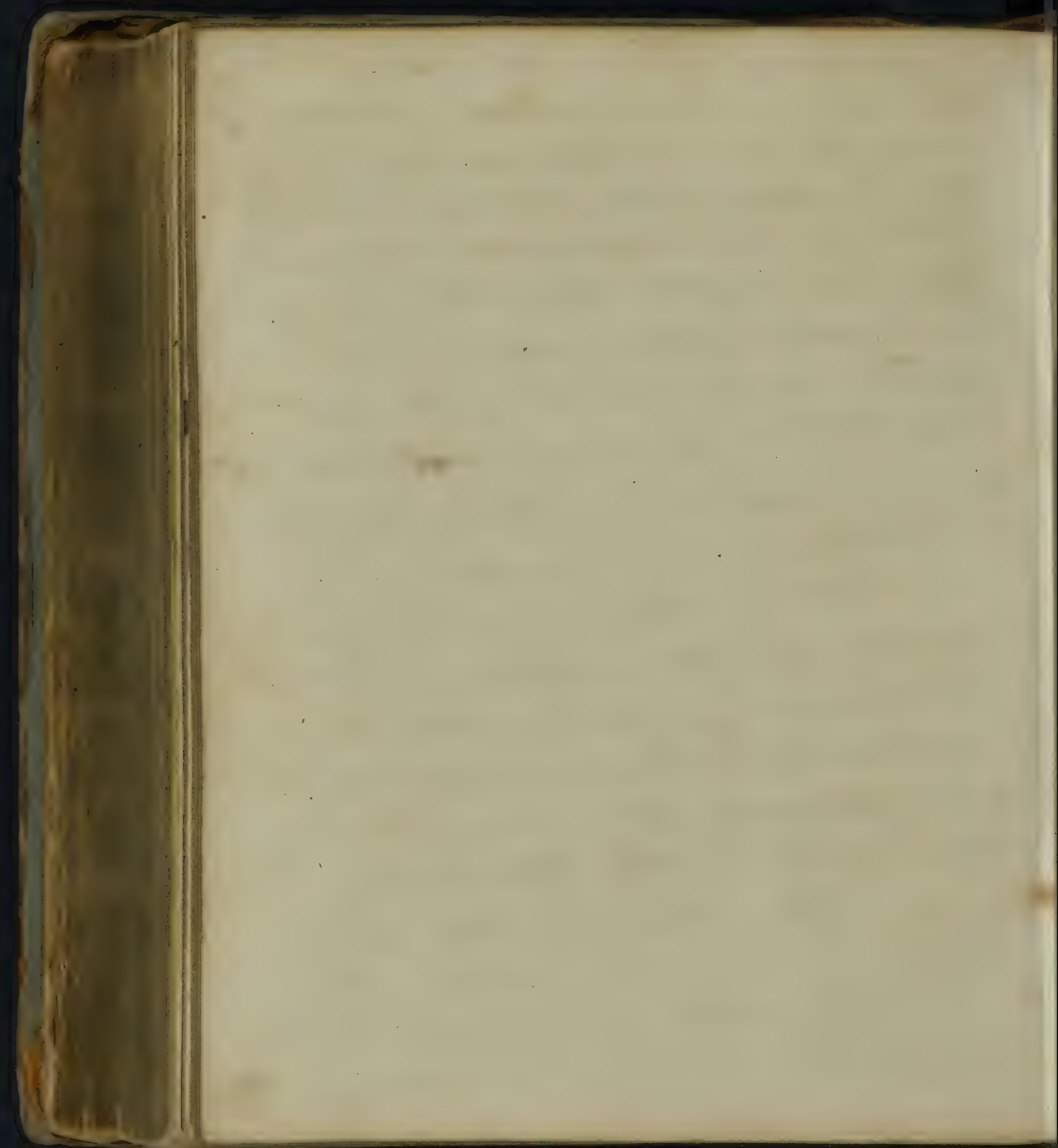
A Justice of the Peace has an exclusive jurisdiction over all actions in which the demand does not exceed £4 and may render judgment on notes or bonds given for the payment of ~~or~~ money, or bills of credit only vouched by two Witnesses, when the sum demanded does not exceed £10 provided always, that if the sum demanded exceed £10 an appeal may be had to the next County Court, except the action be on note &c

The Justice also has a power to render judt. on a confession for £20 —

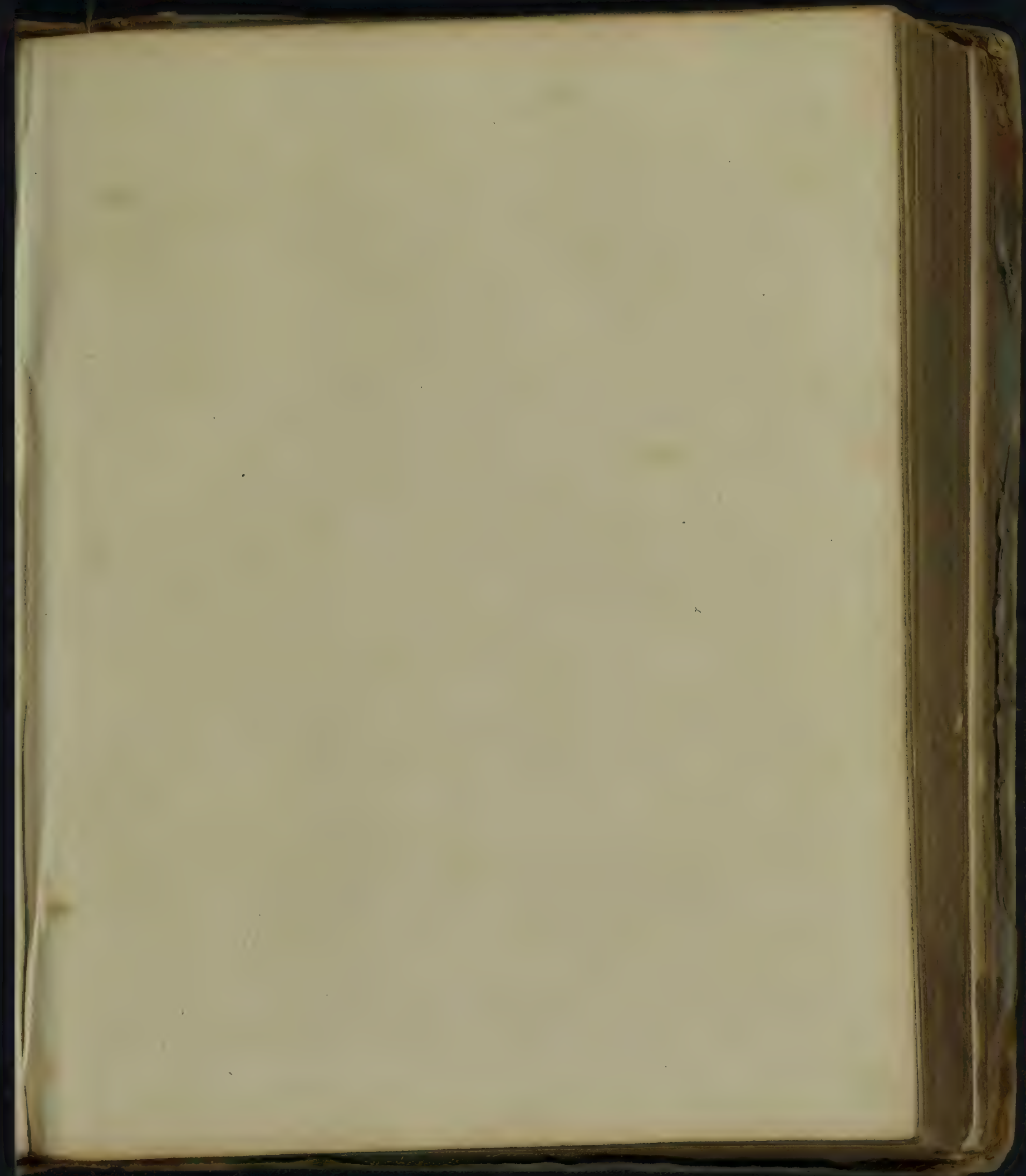
He has also ~~jurisdiction~~ jurisdiction over an action of debt on judgment for the recovery of £10 which judgment was rendered by some other Assistant or Justice &c — provided the suit be brought within 5 years after the first judt. —

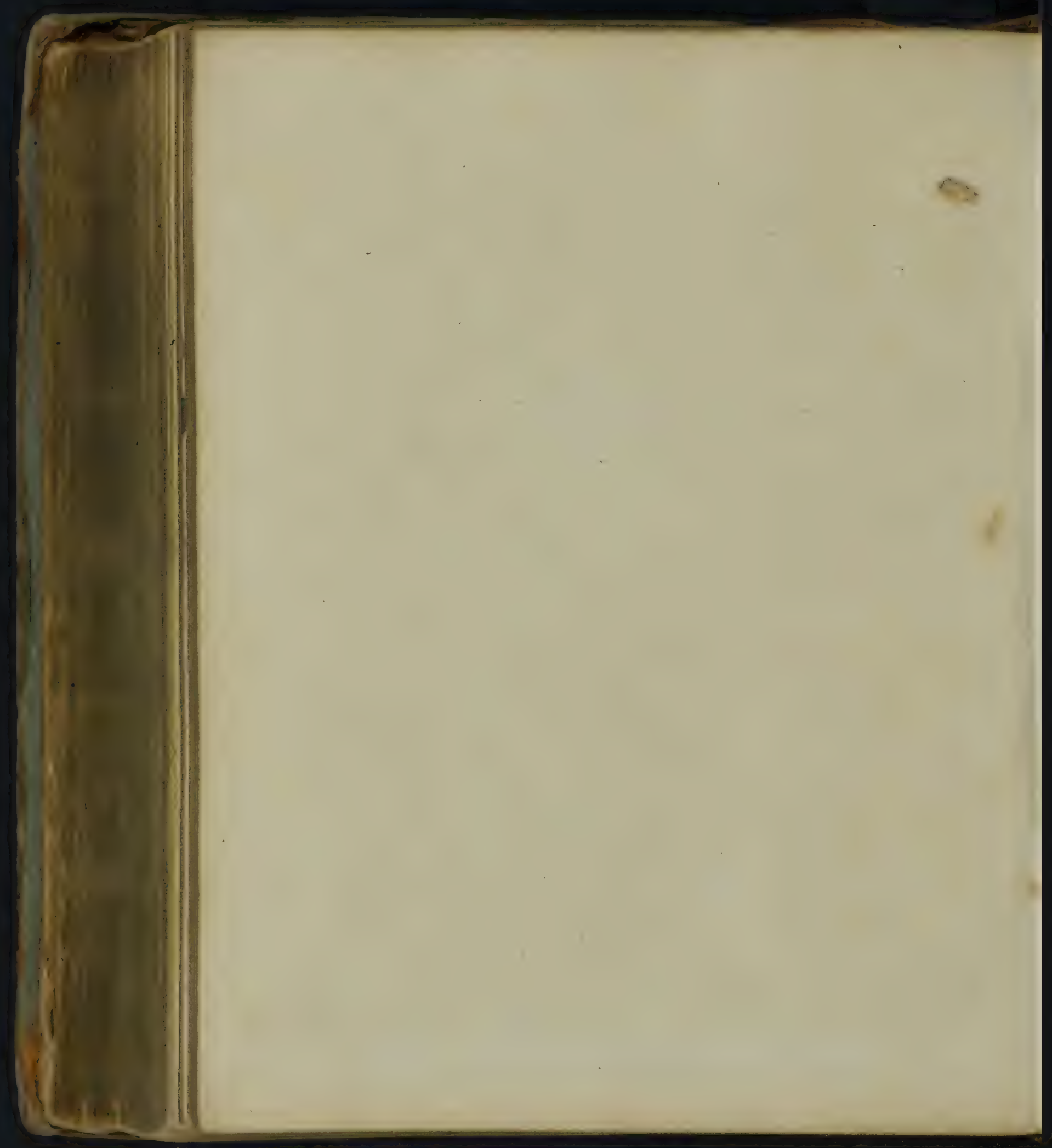




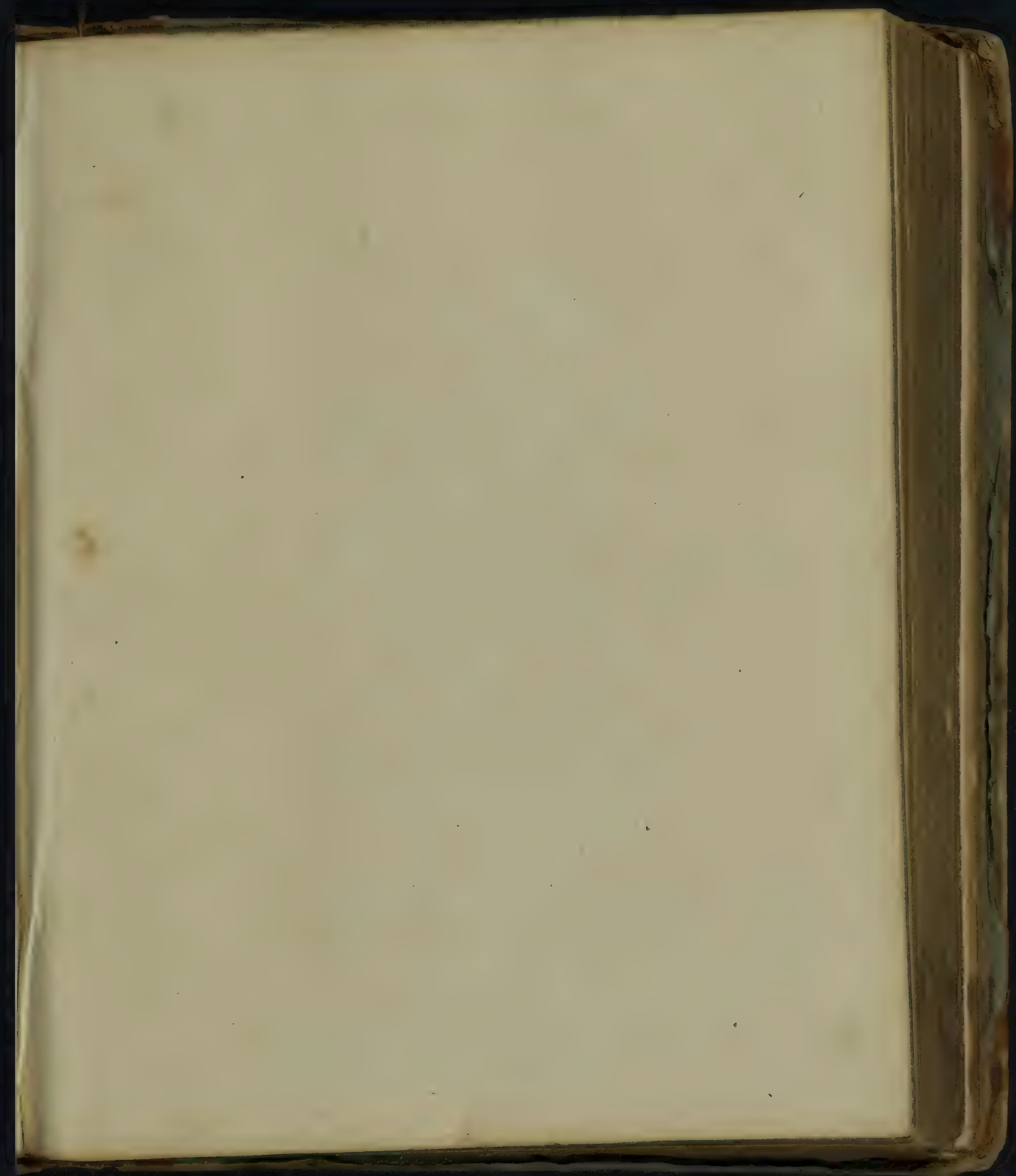


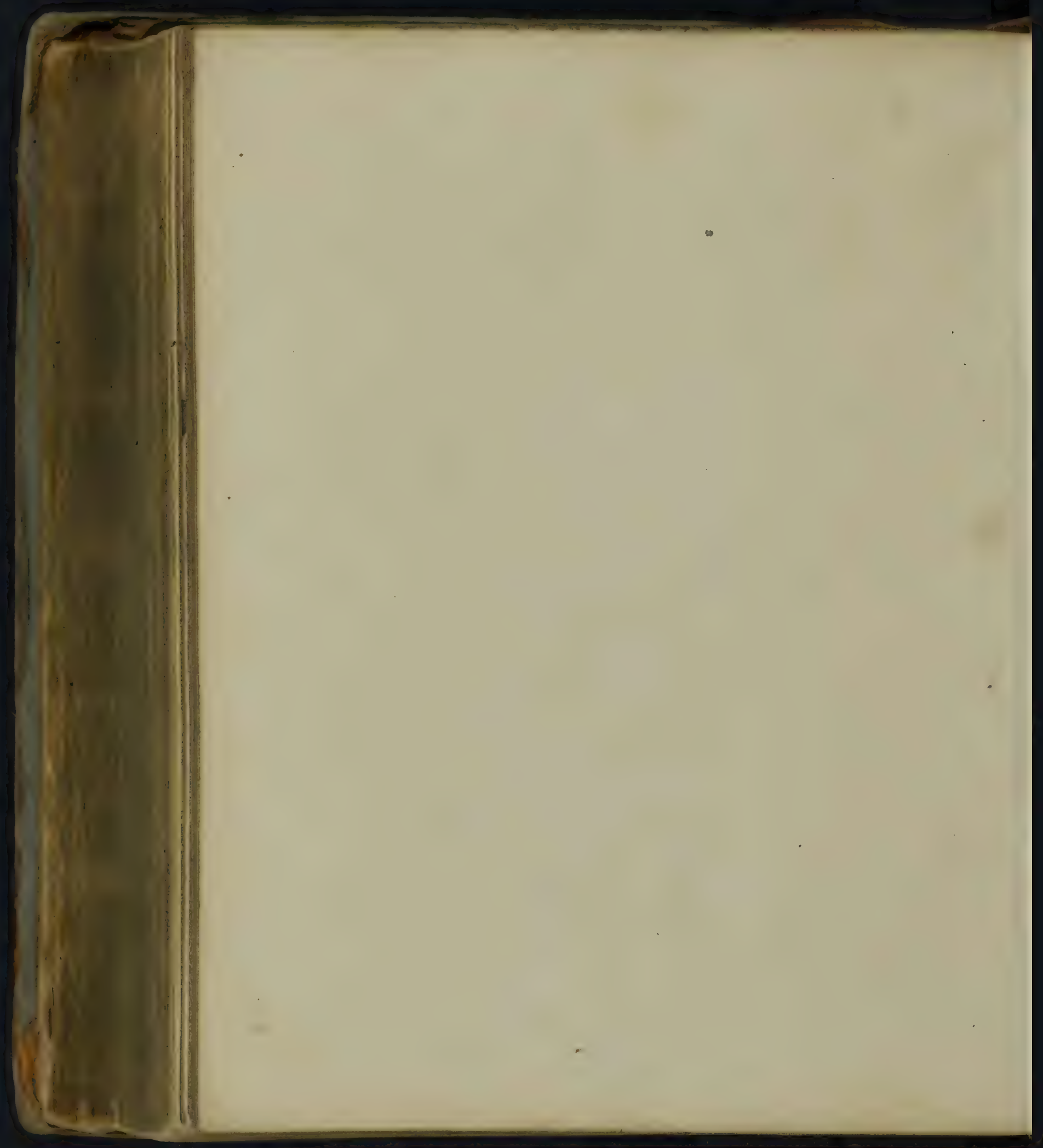




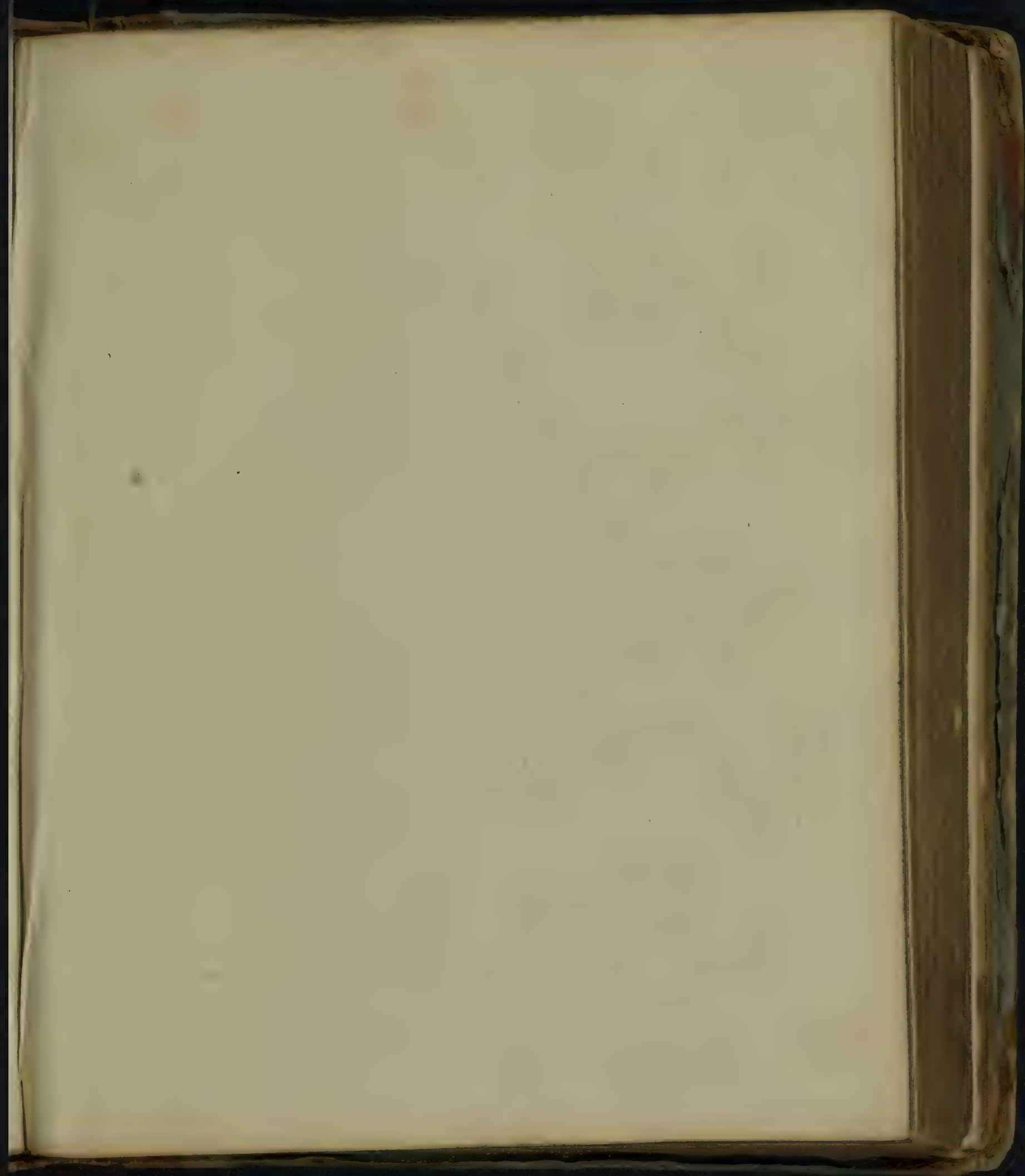


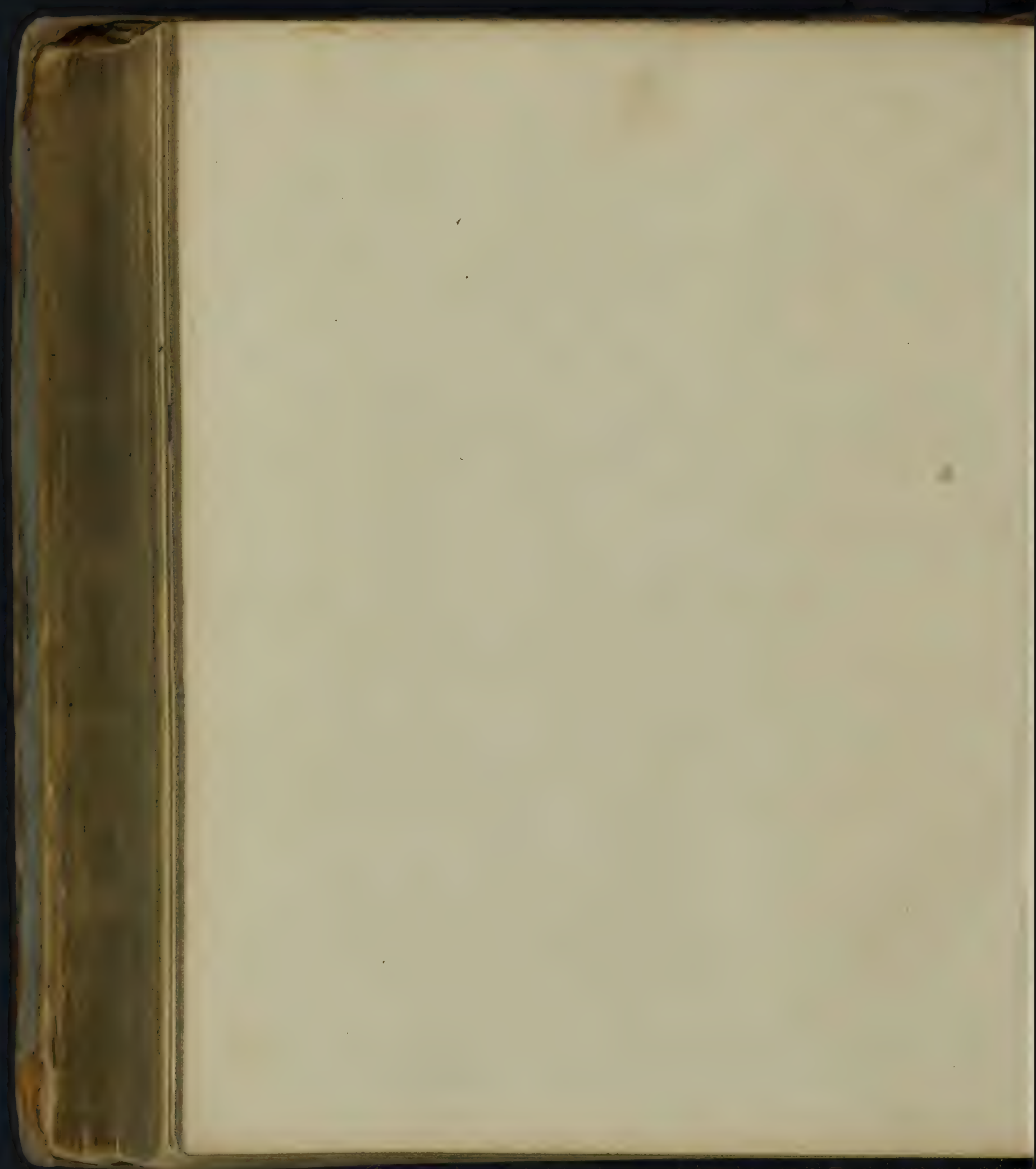




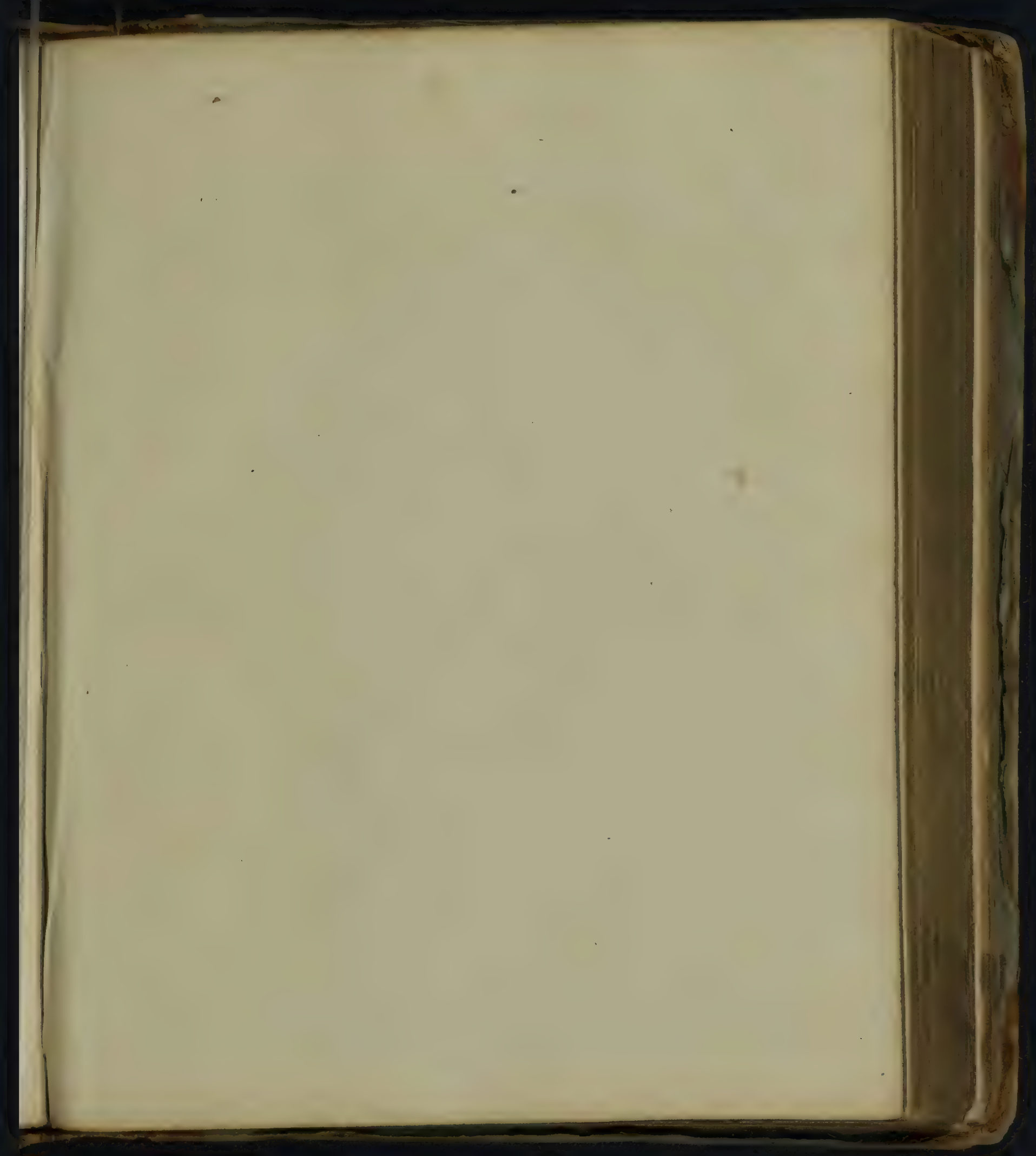






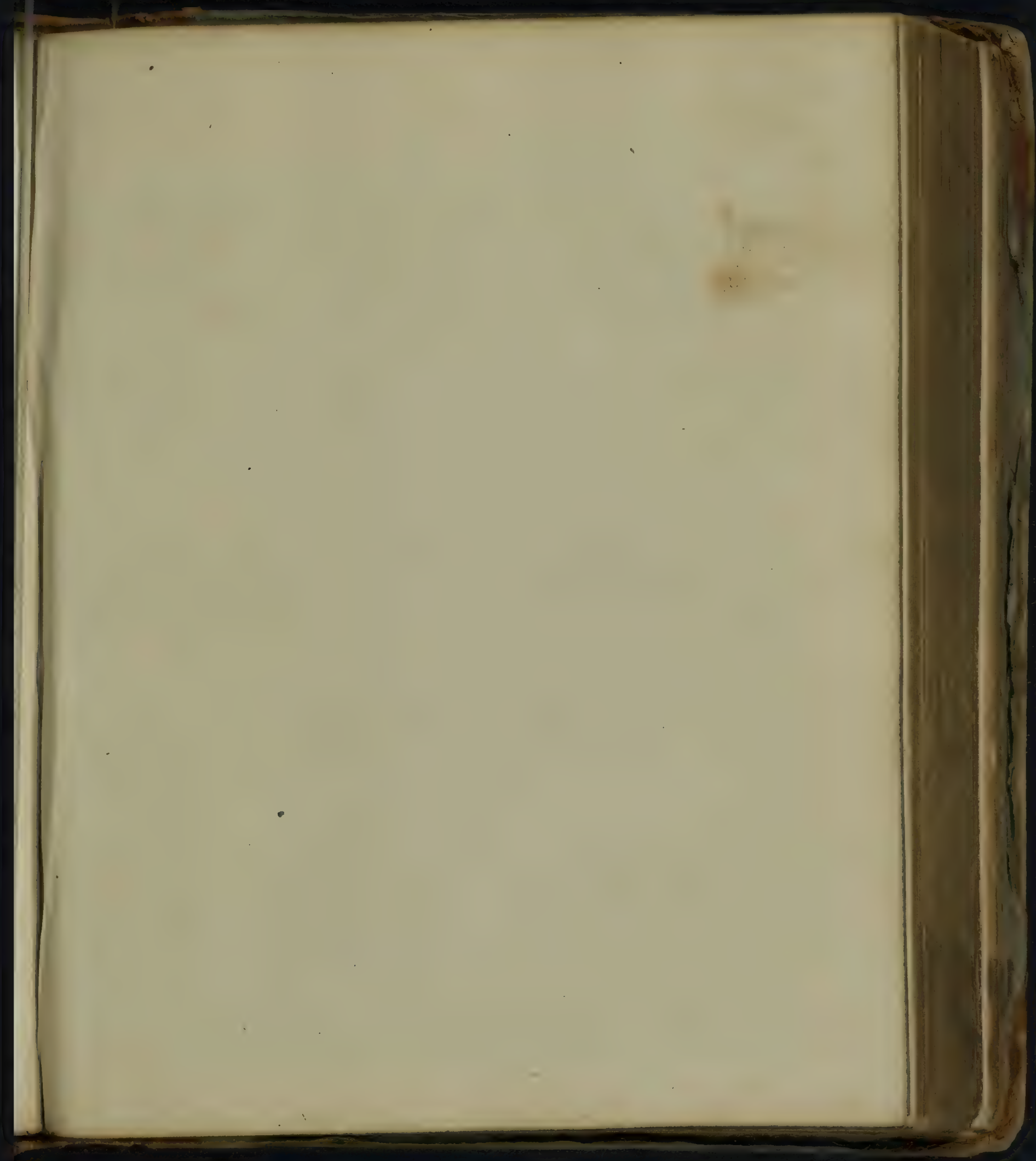


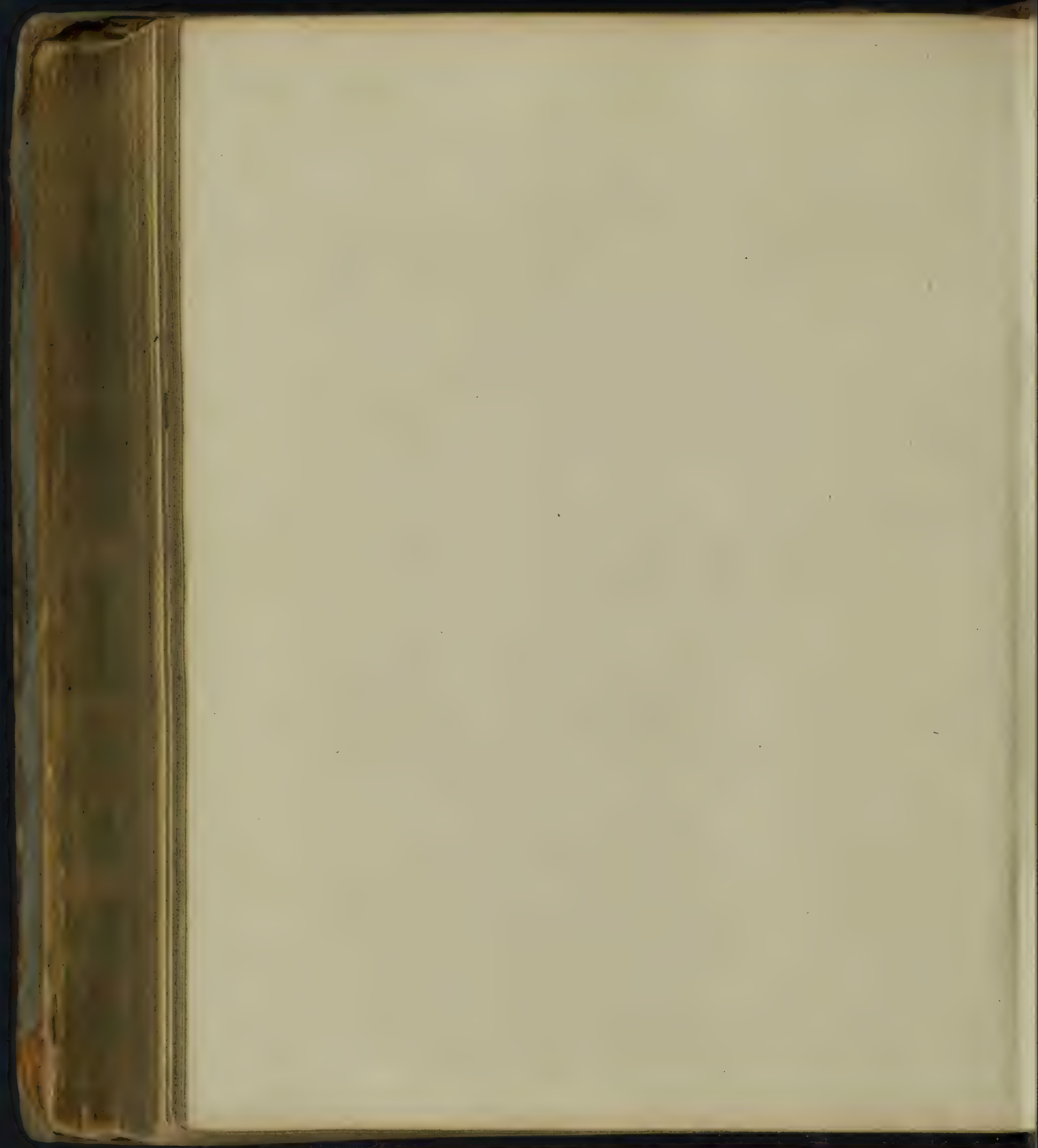




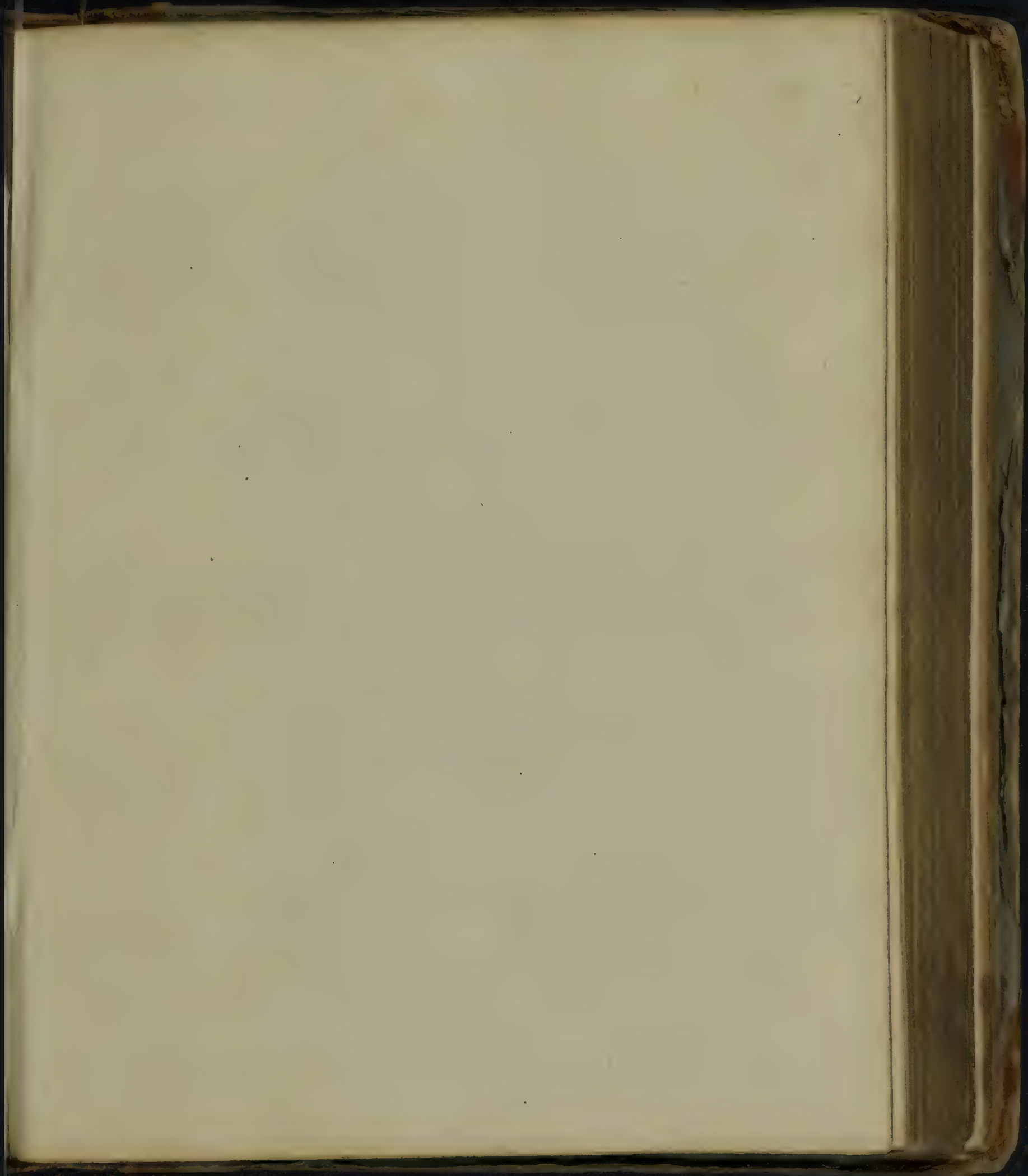






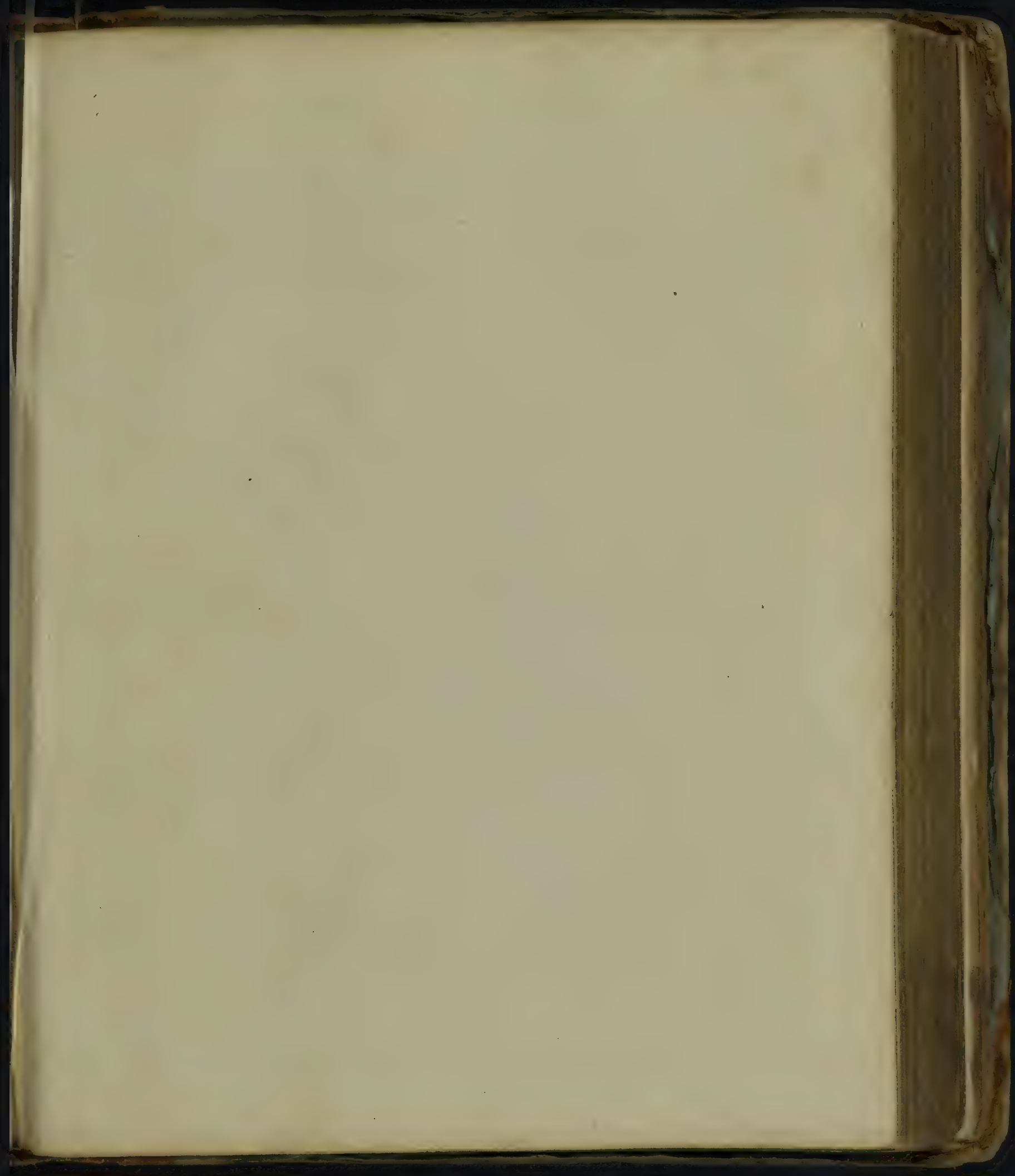






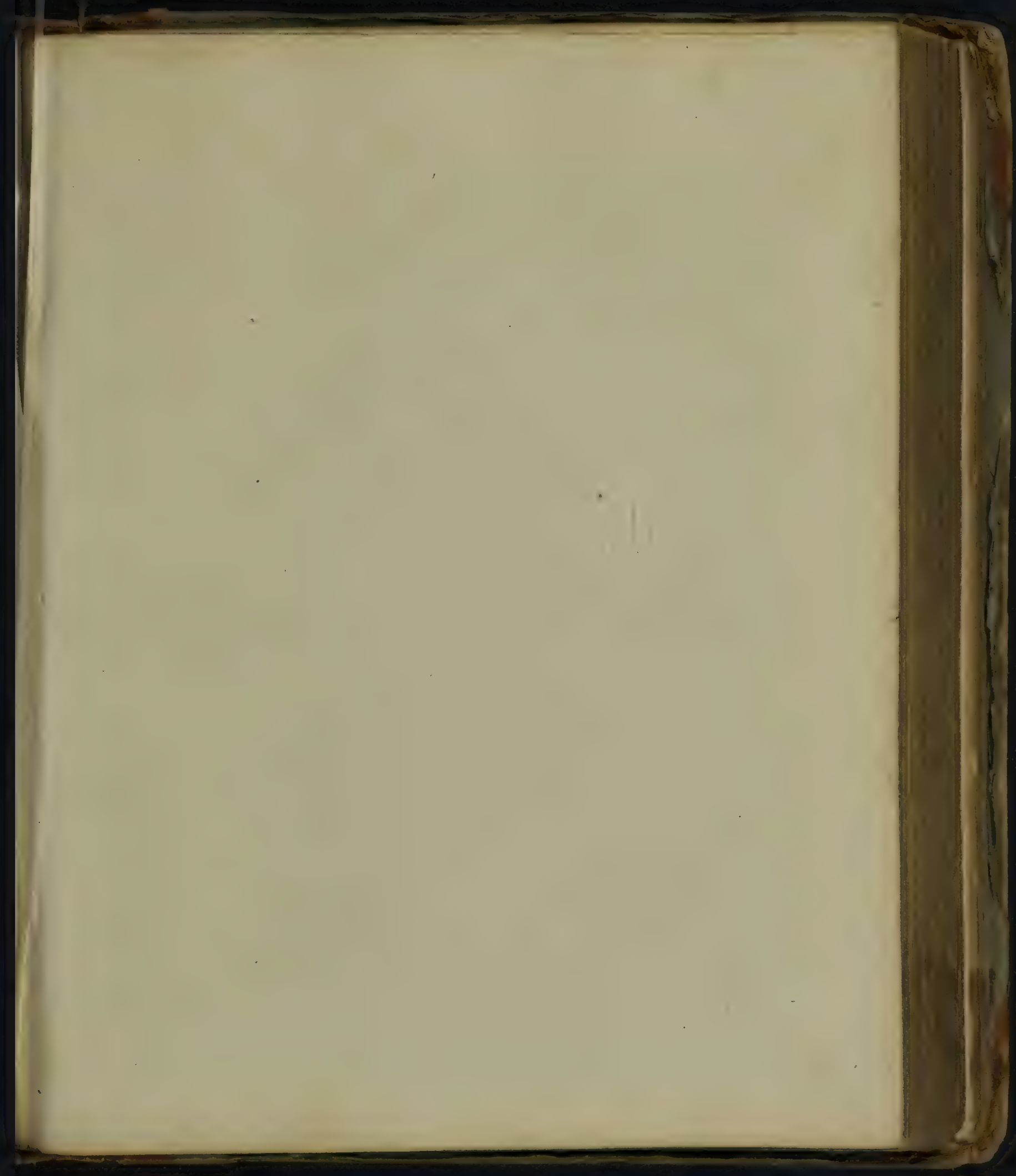






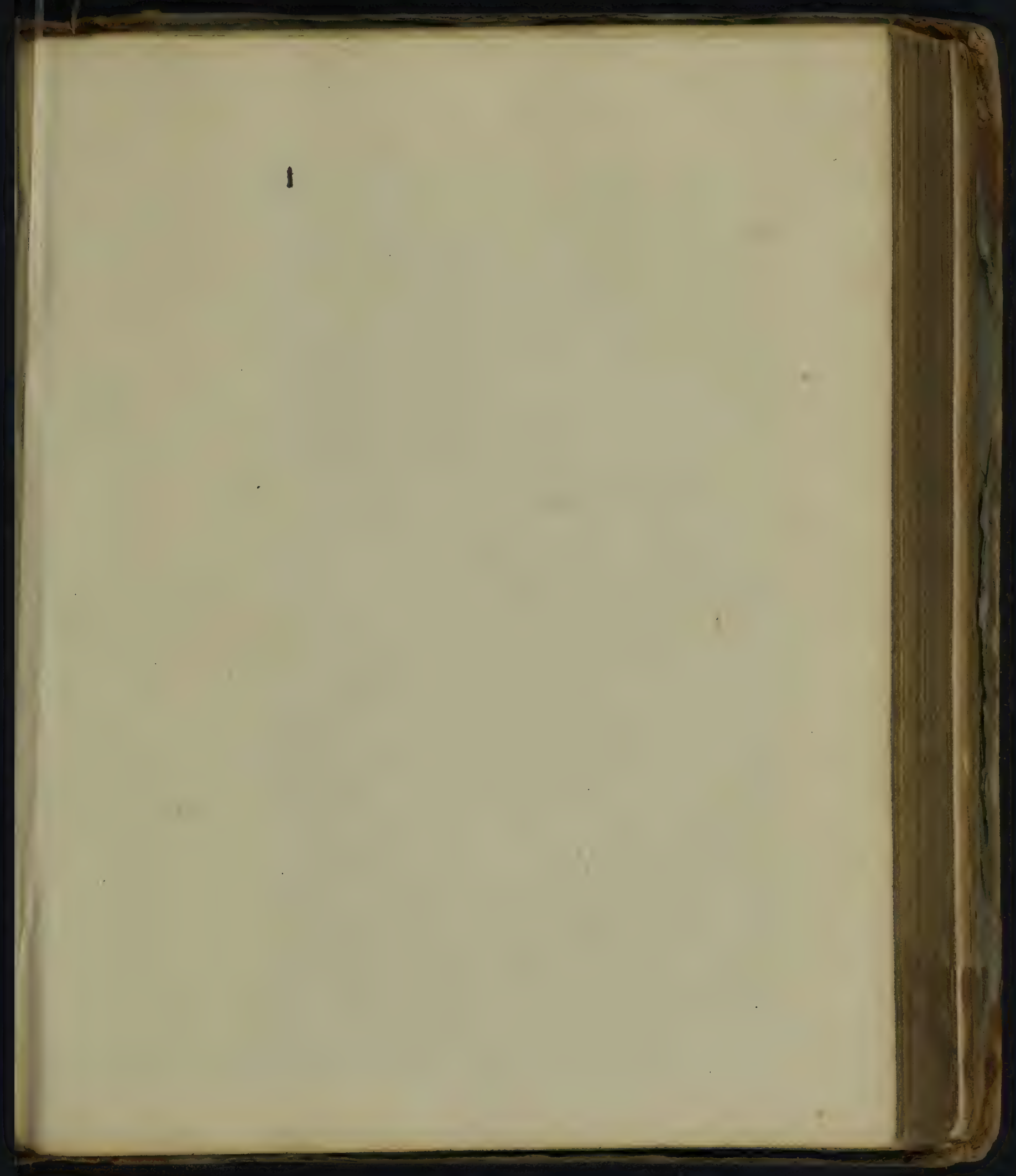






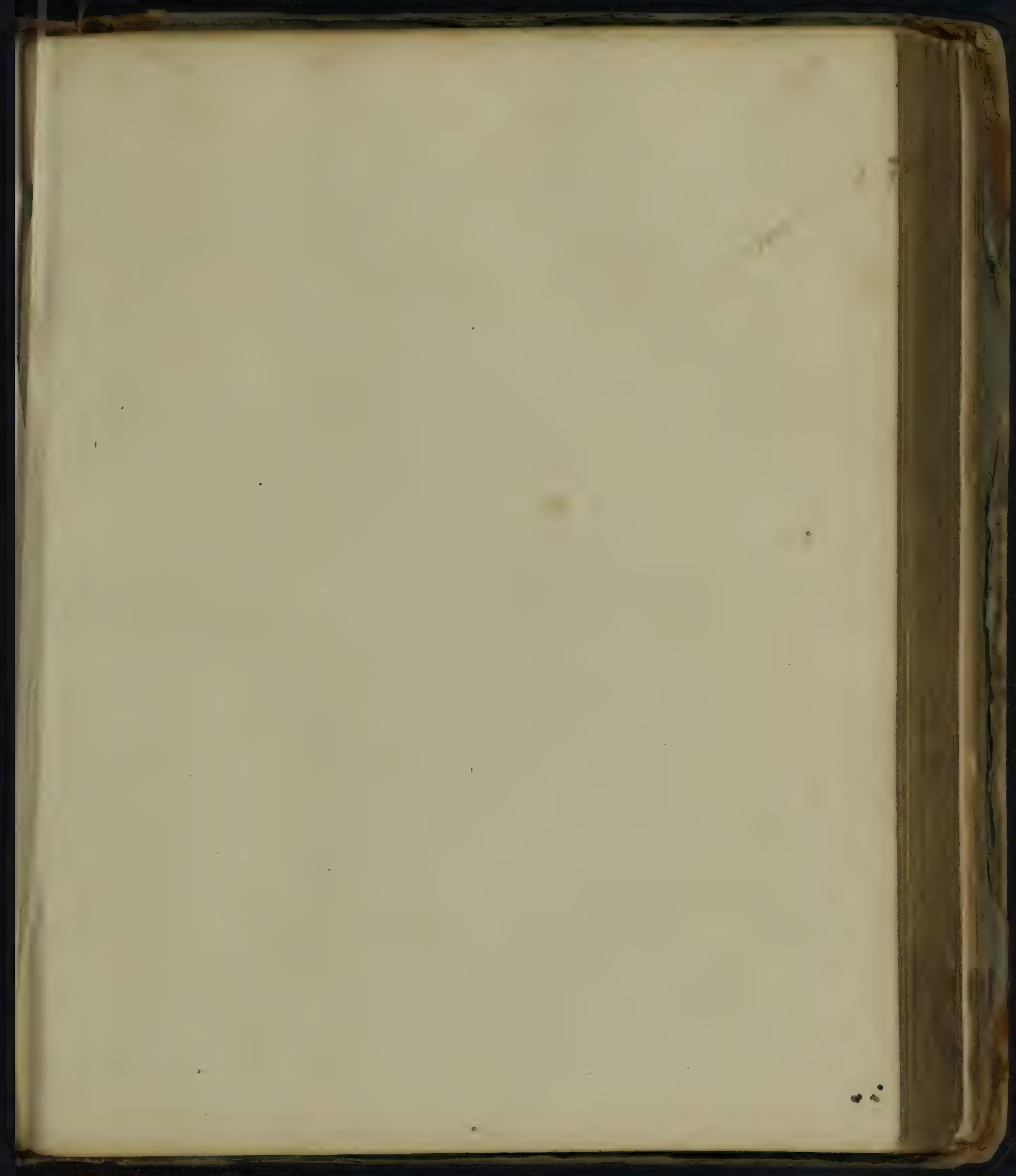






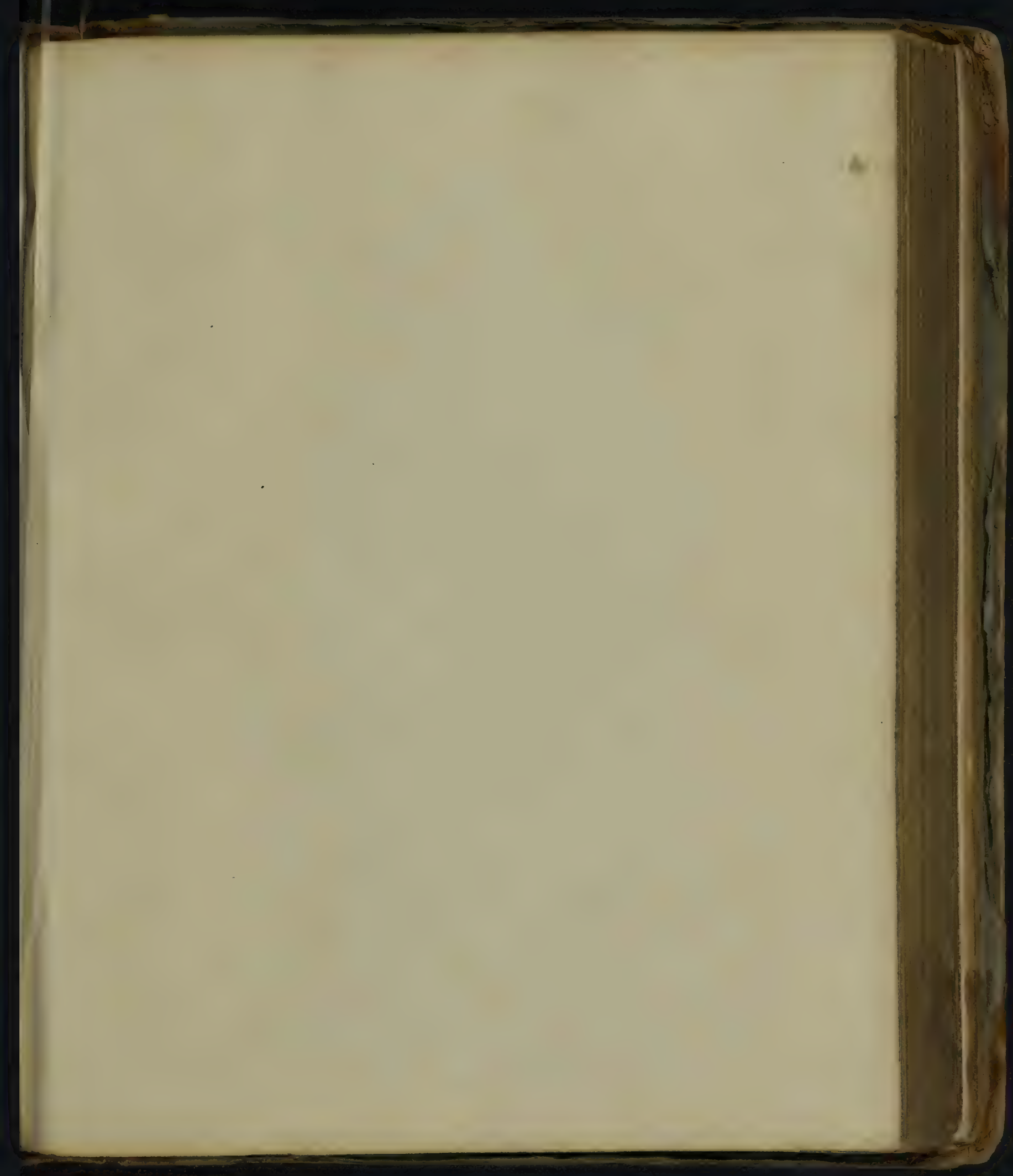


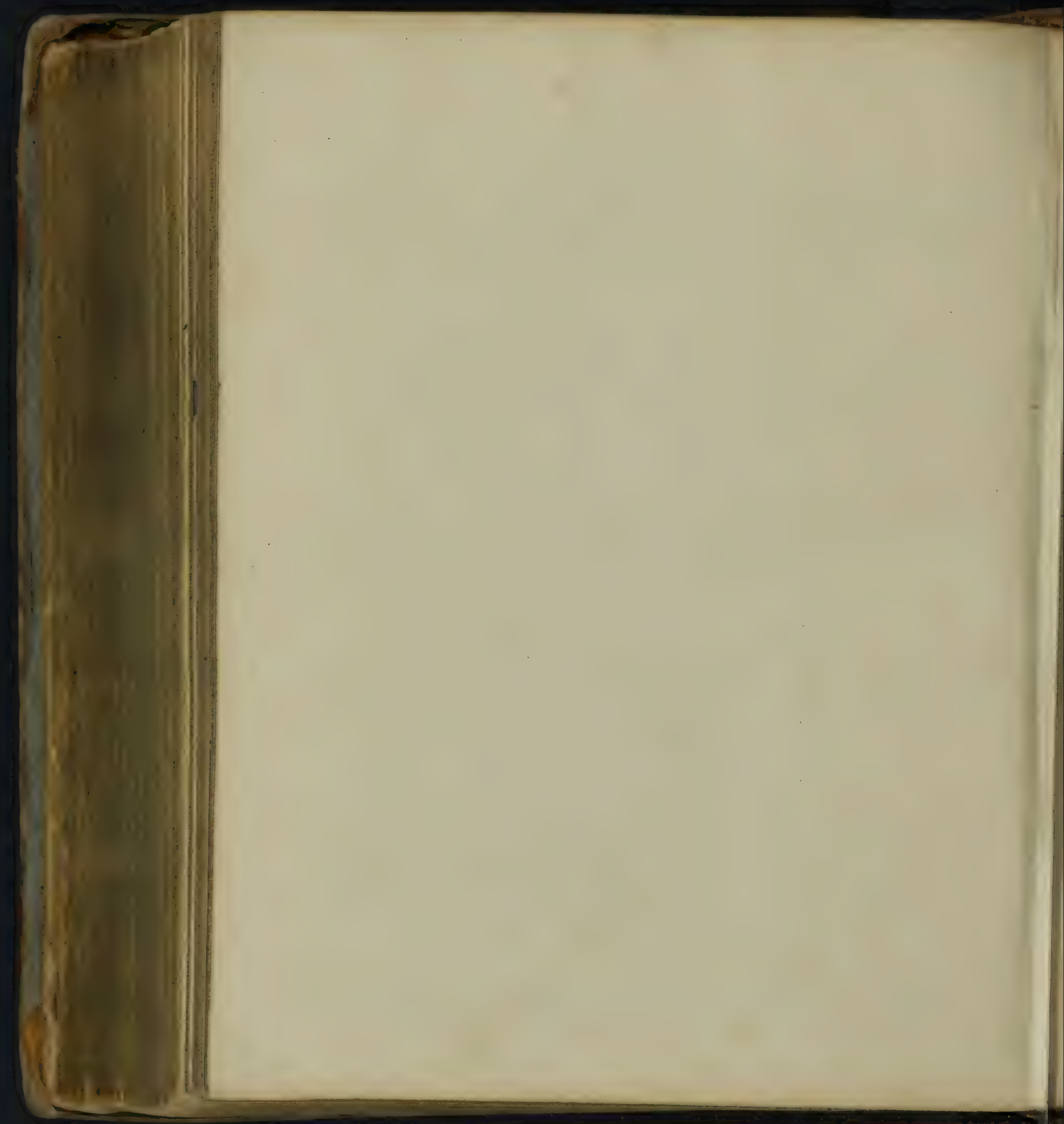




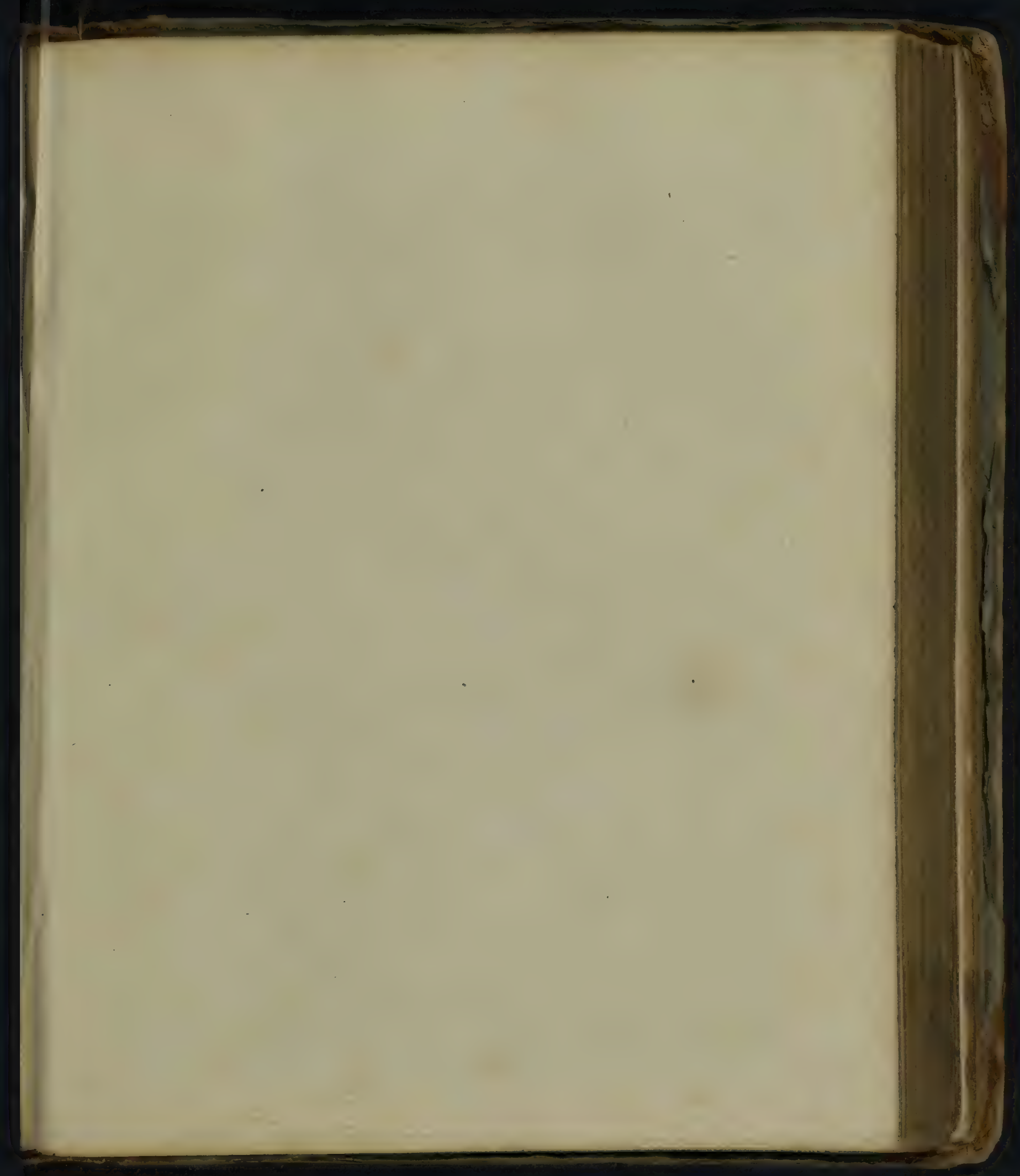


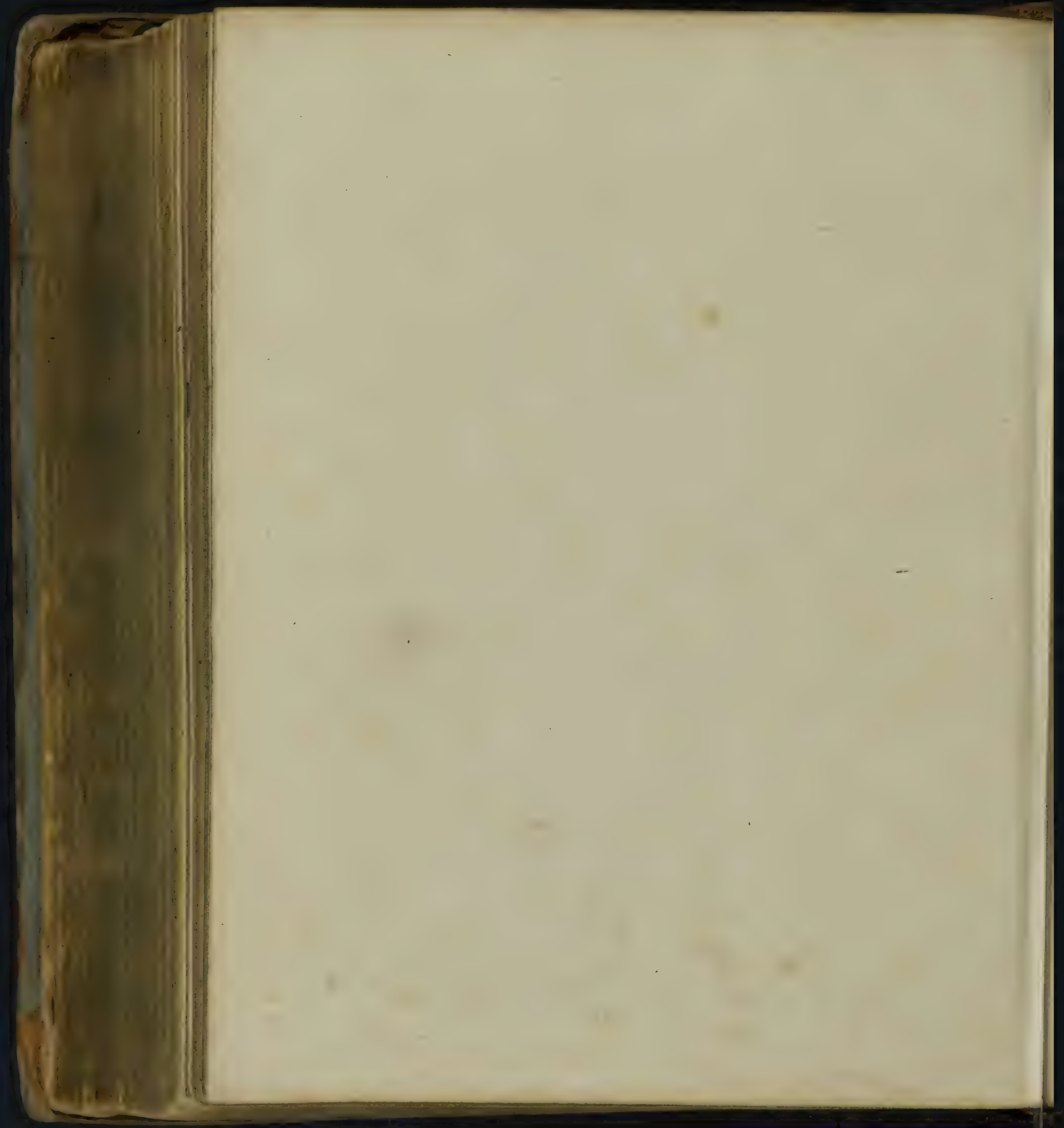




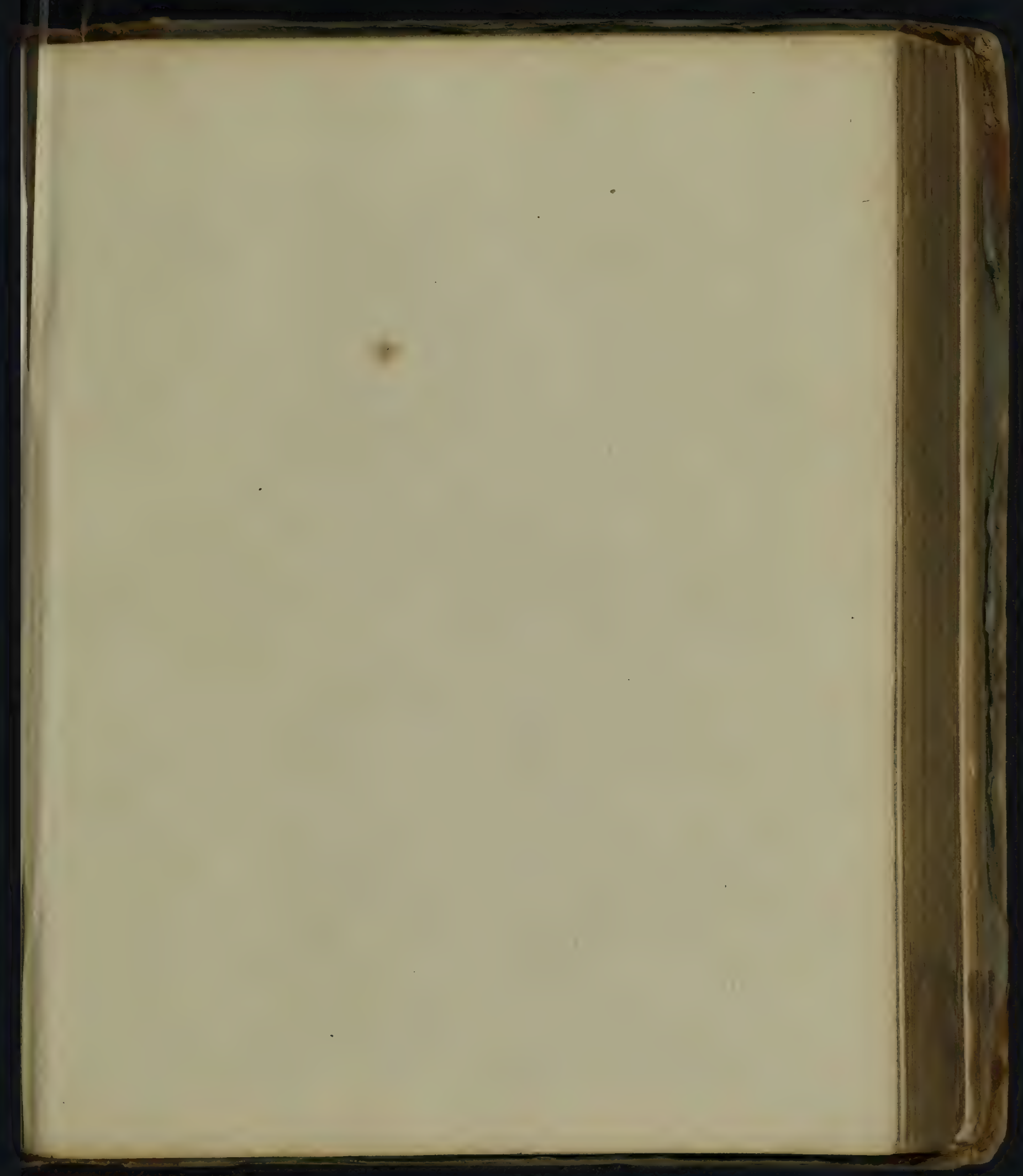






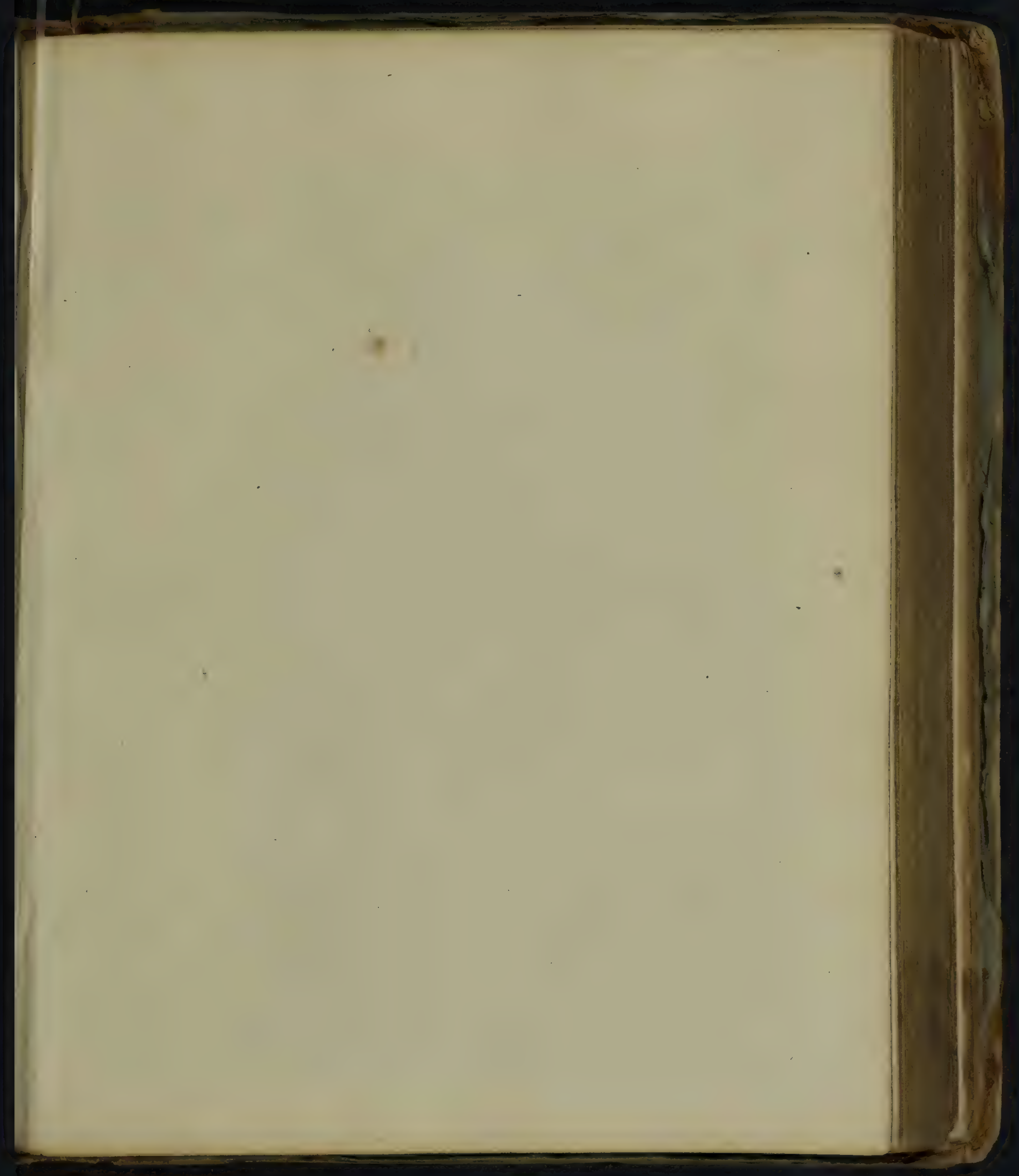






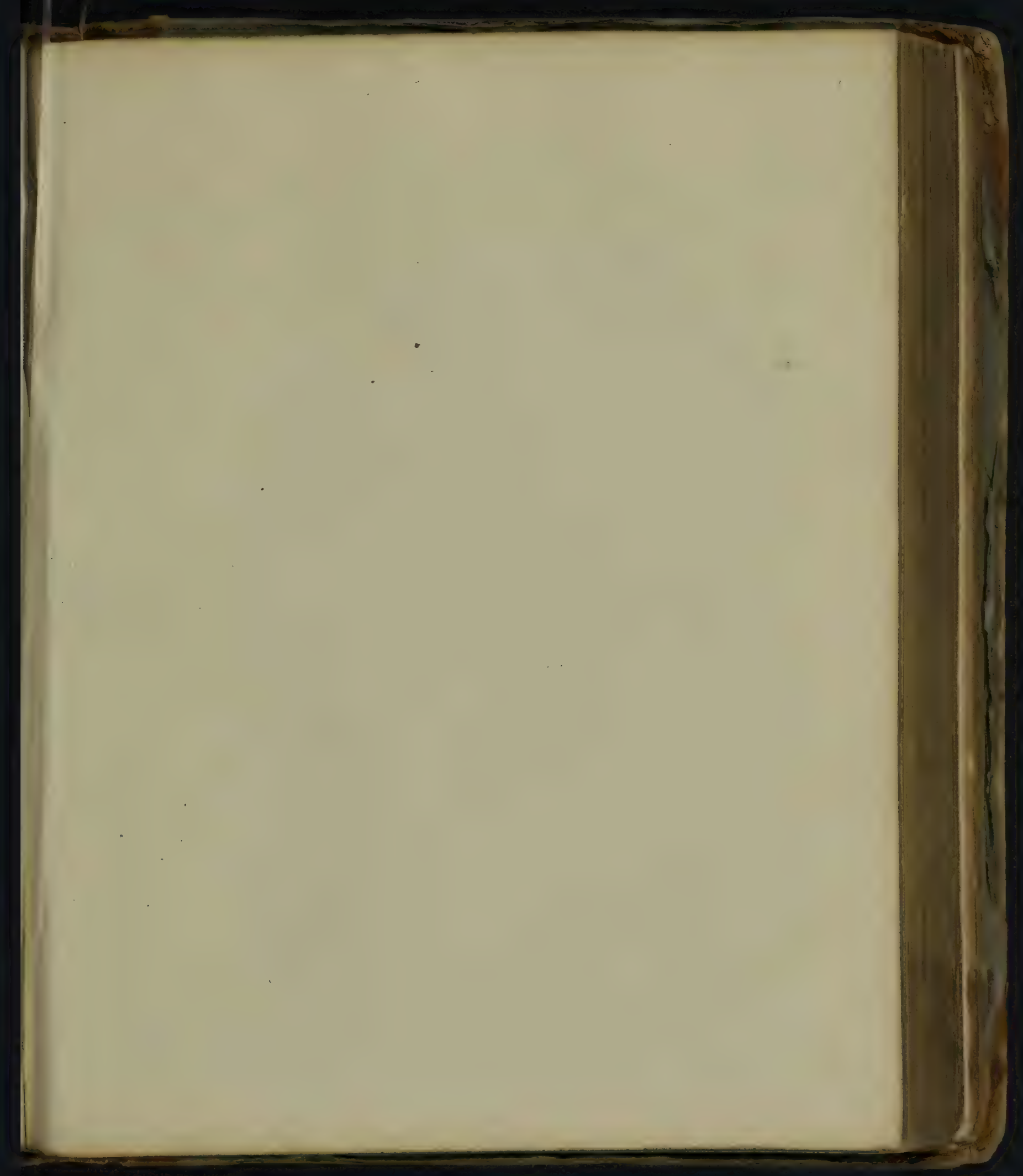






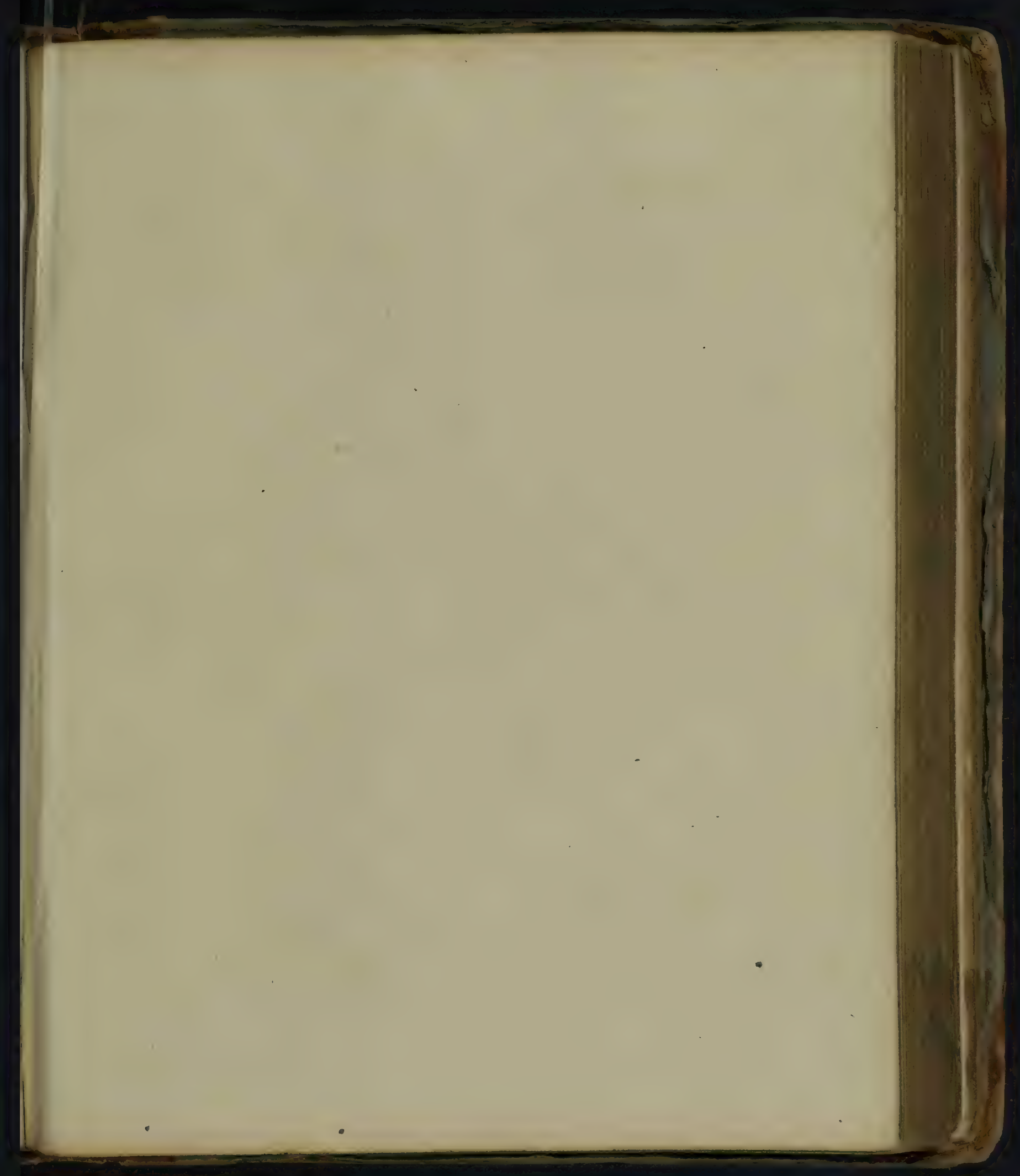


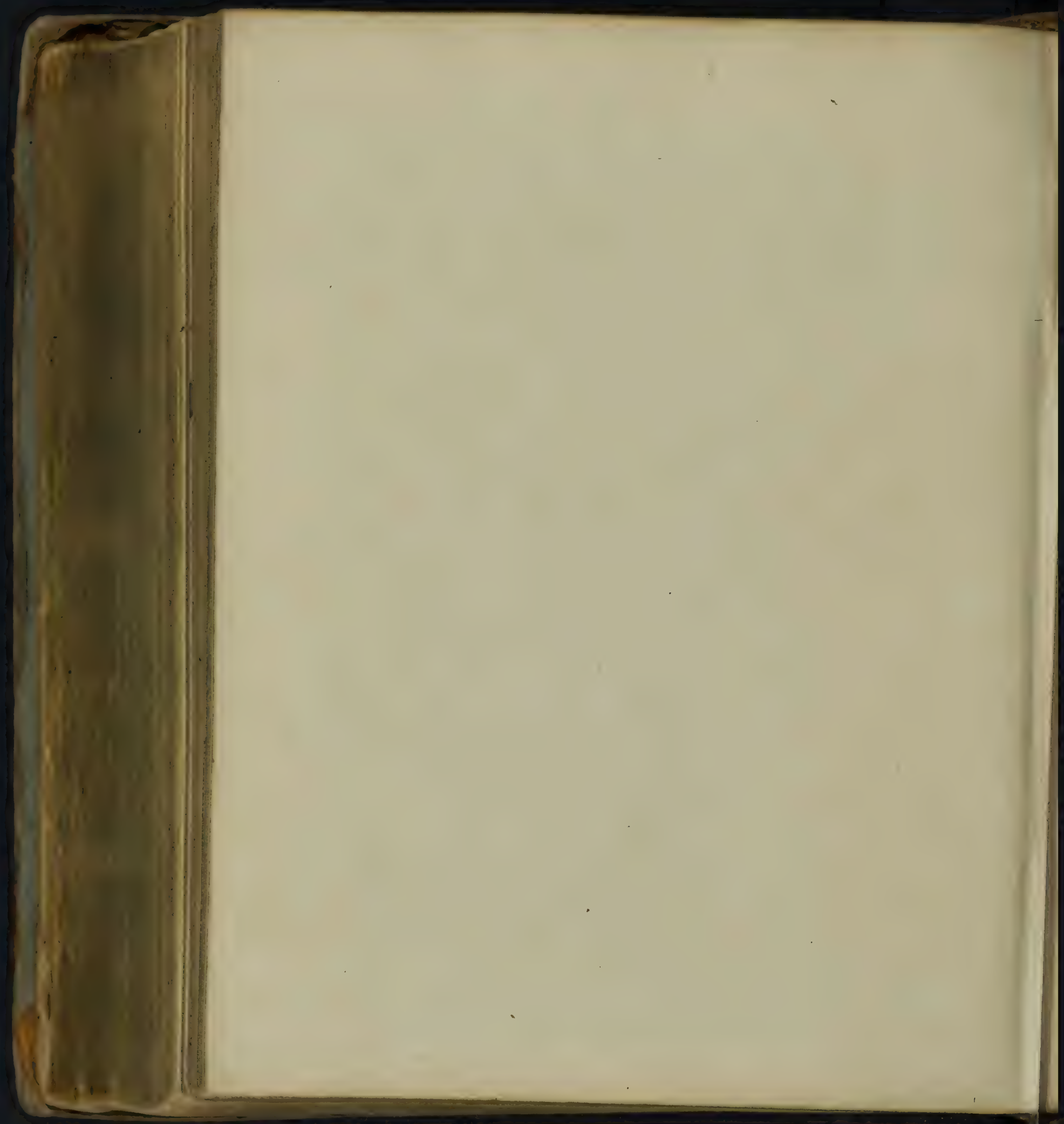




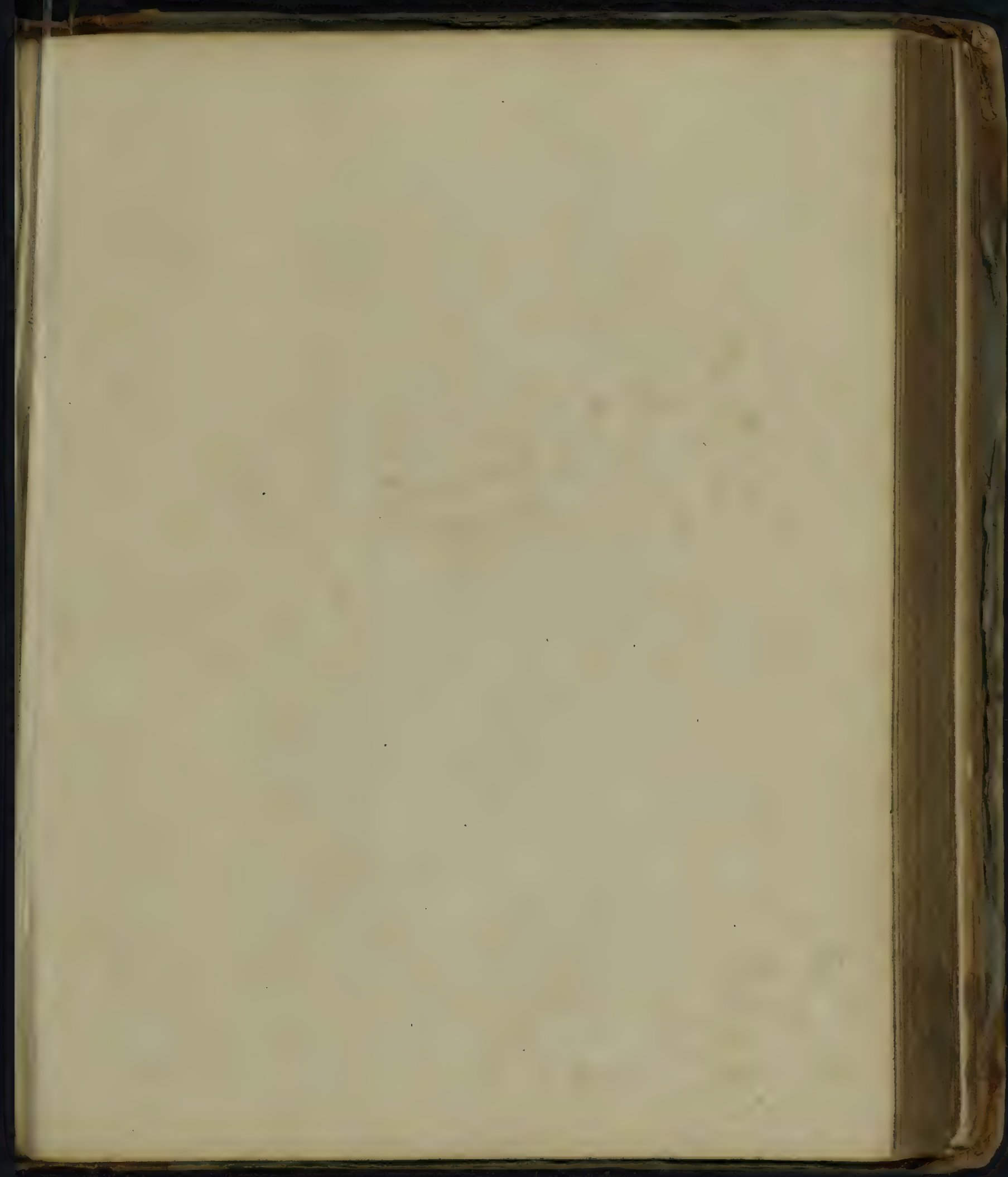






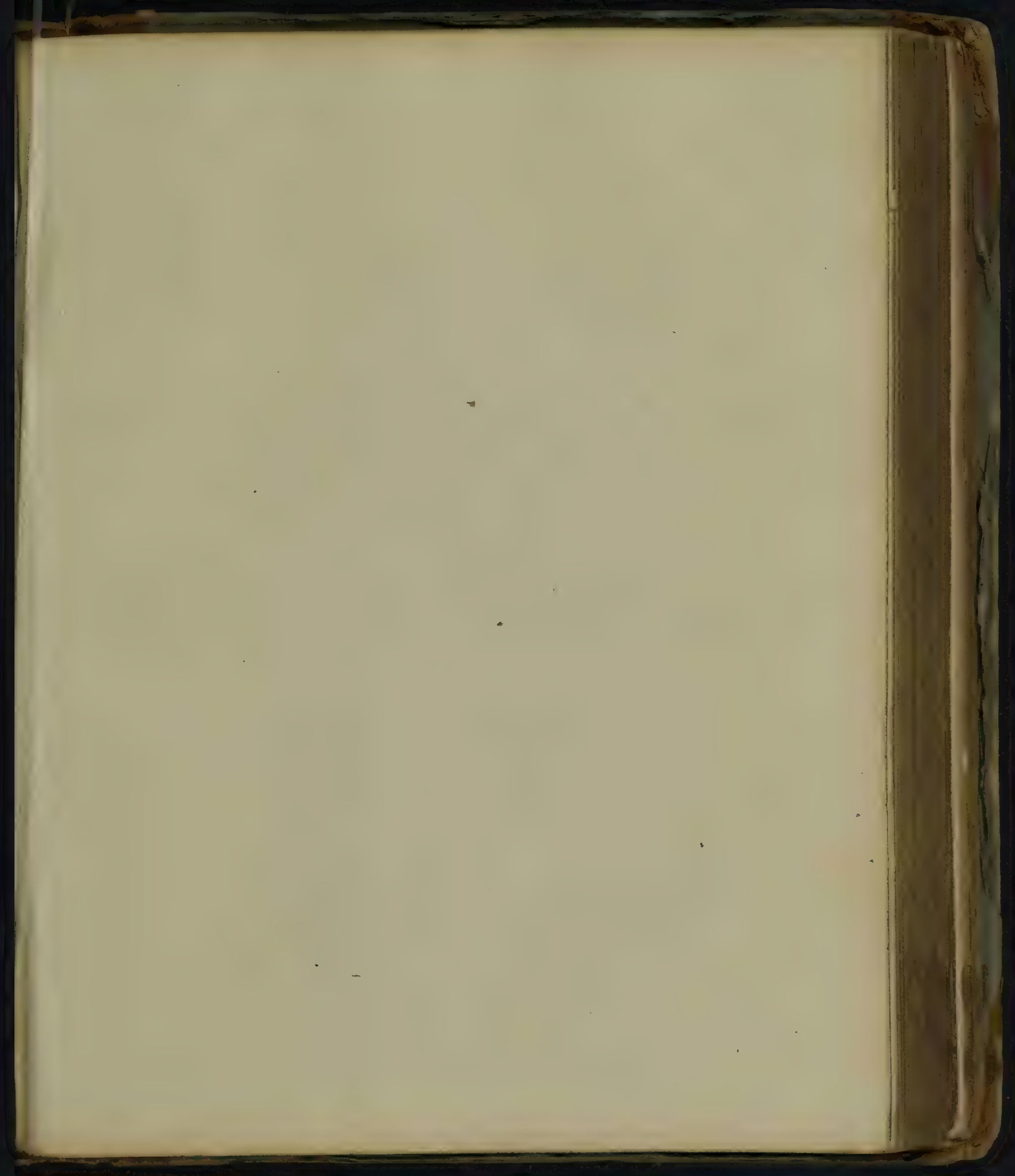






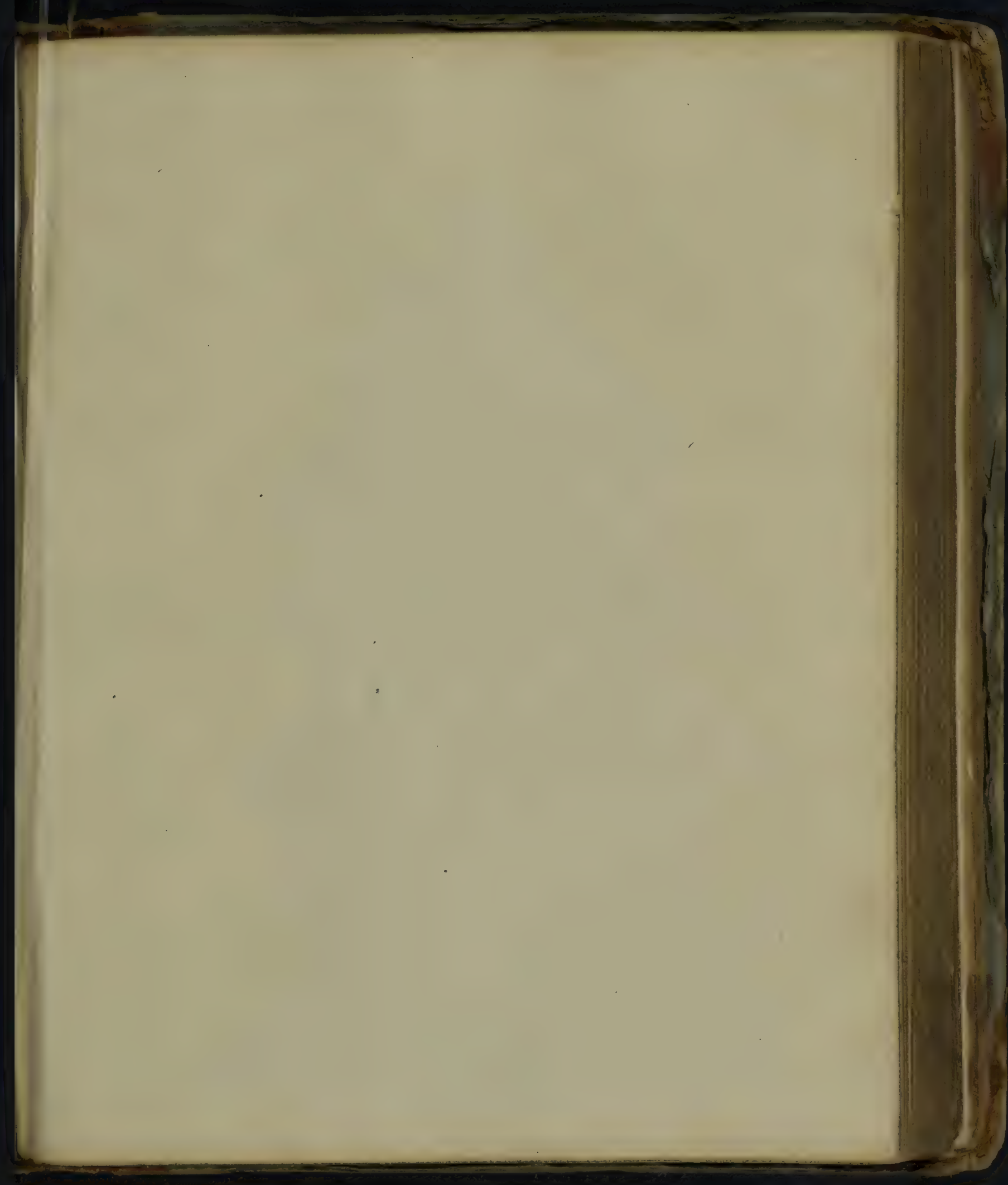






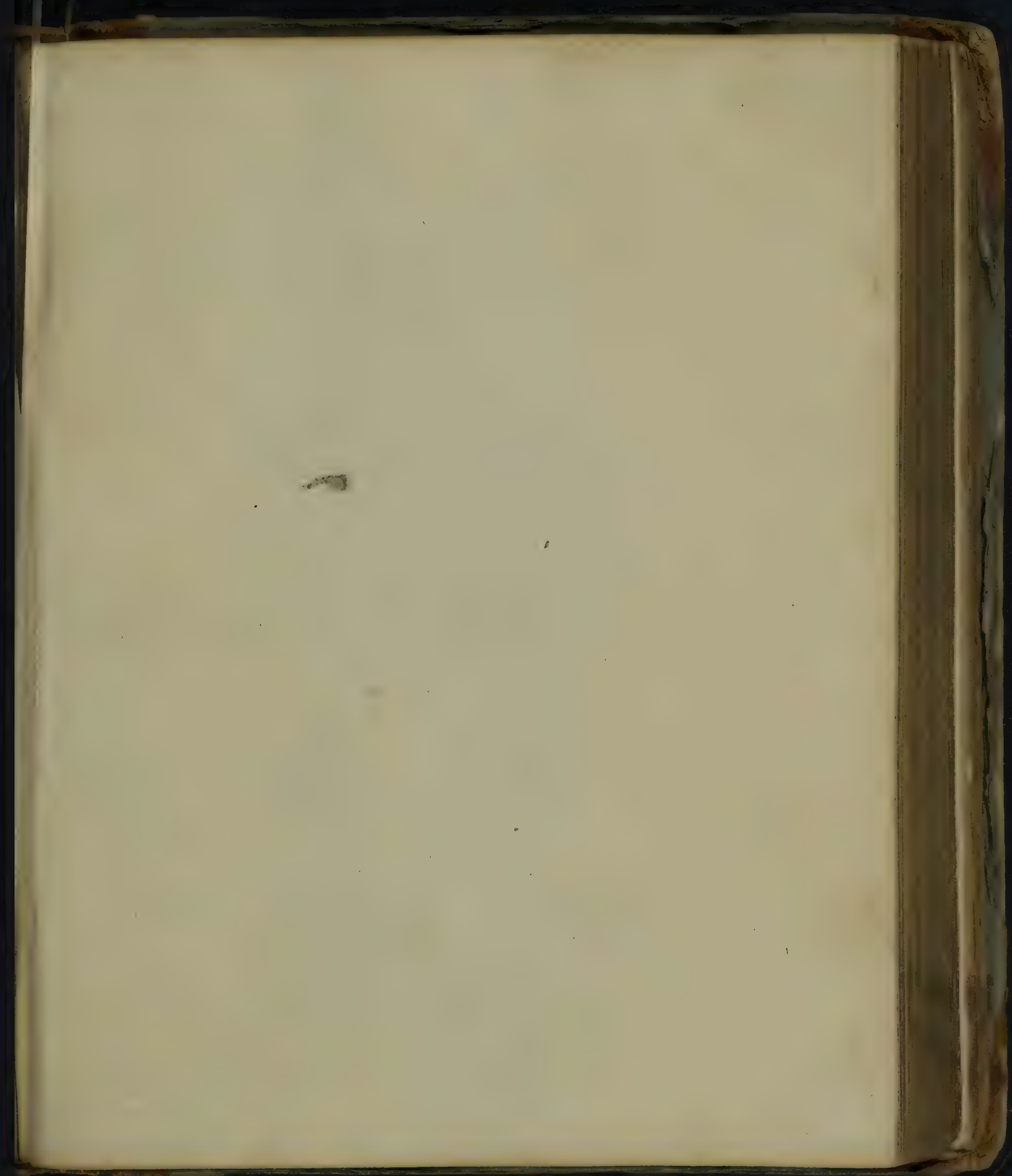






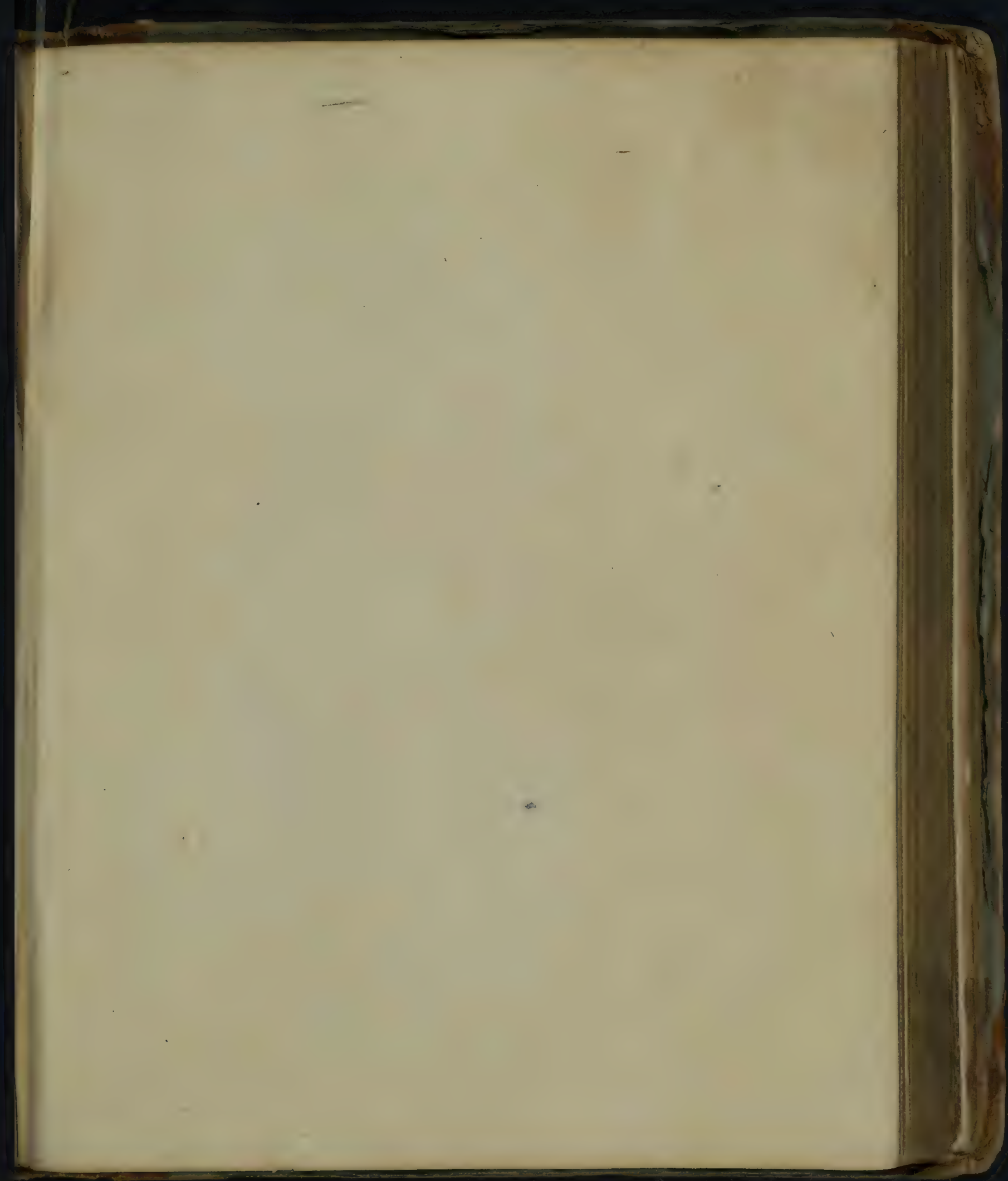






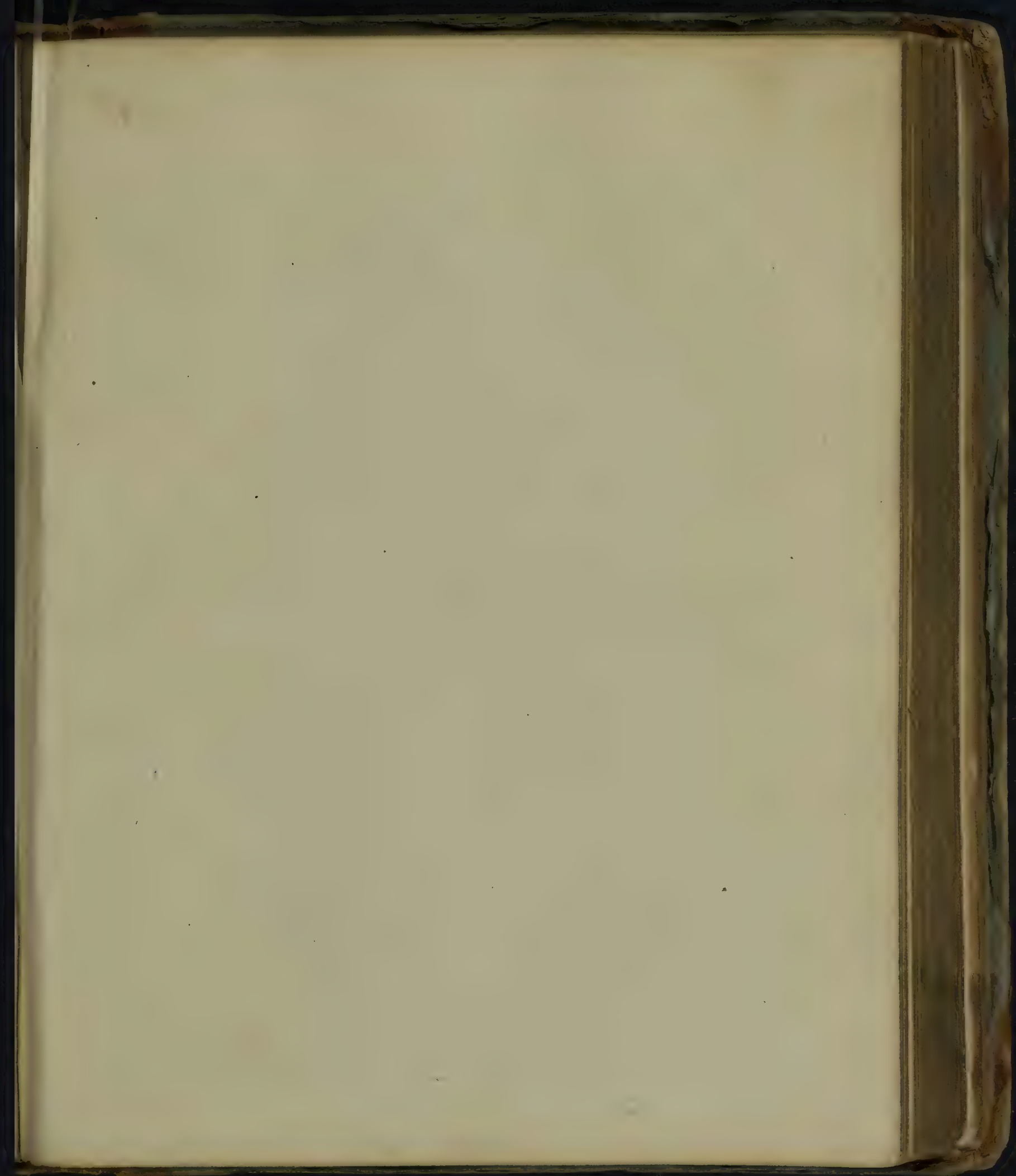






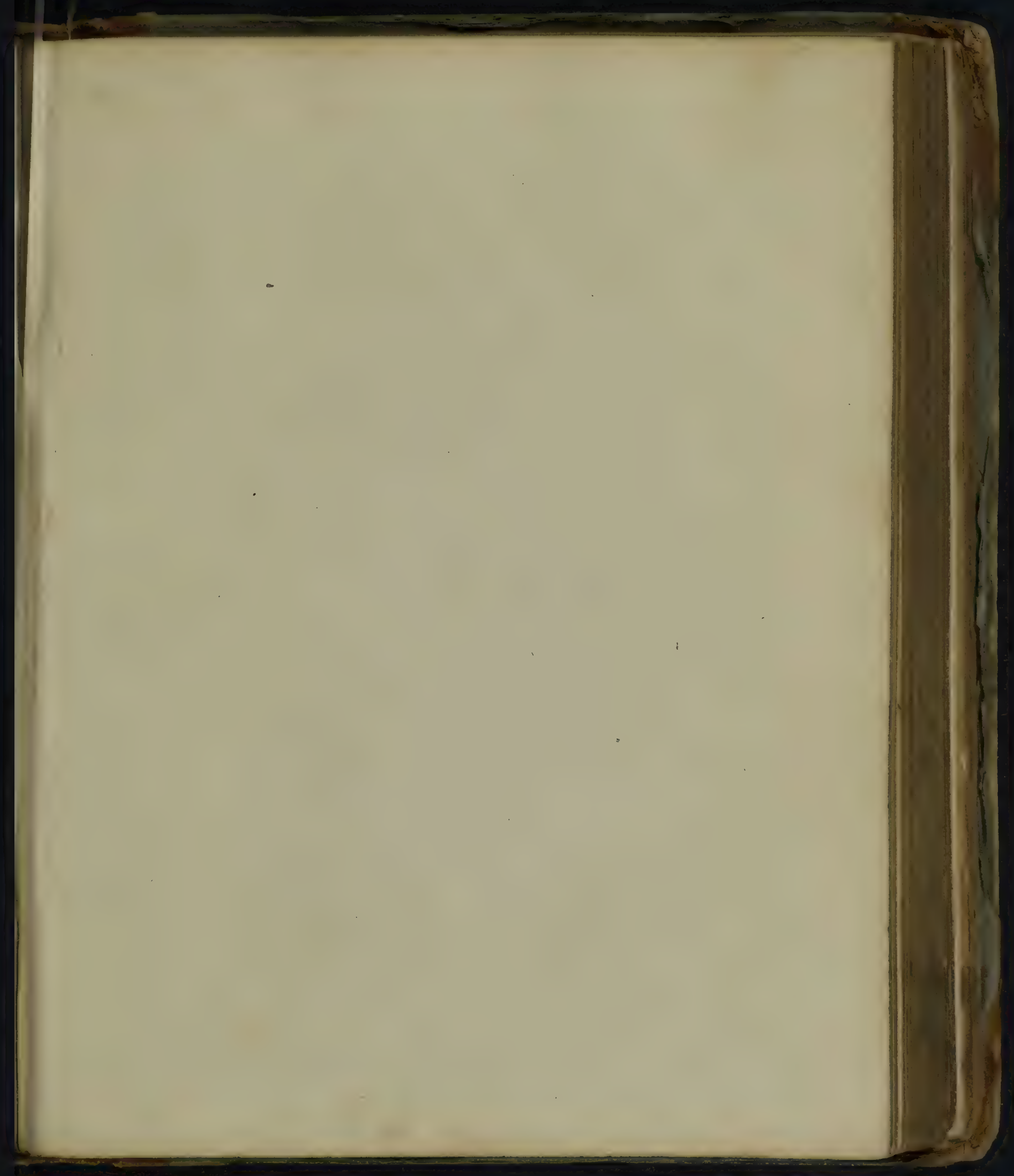


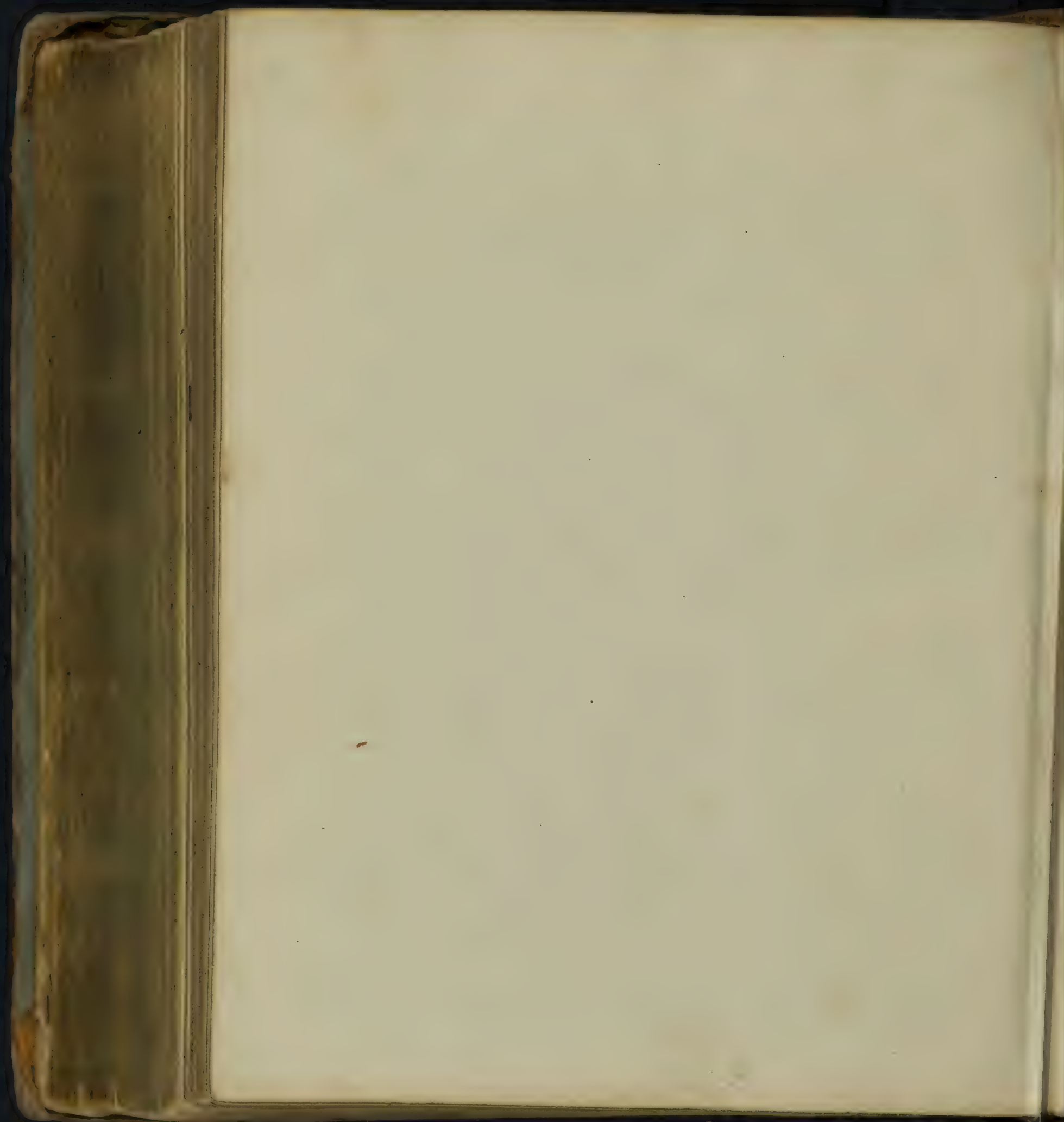




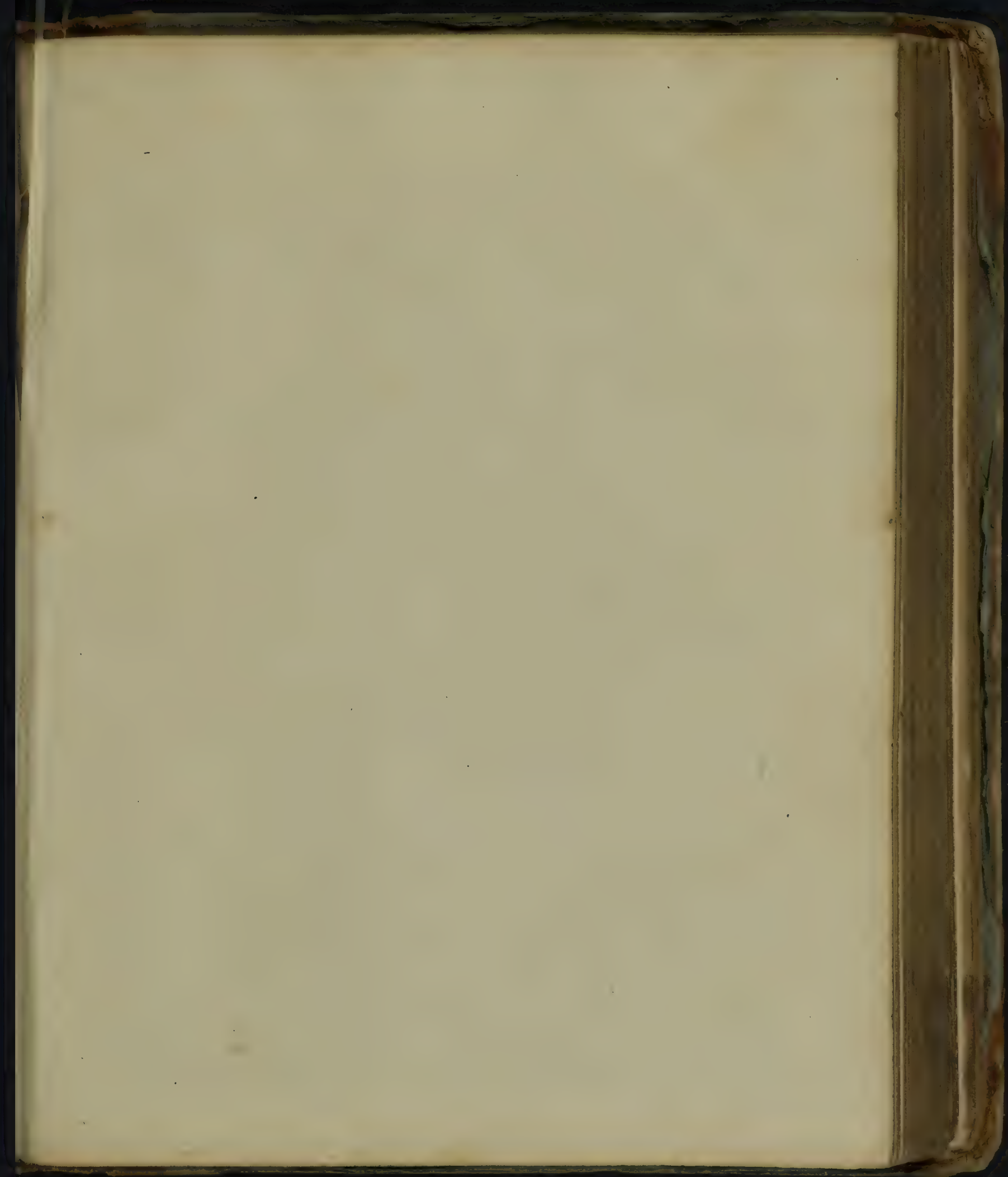






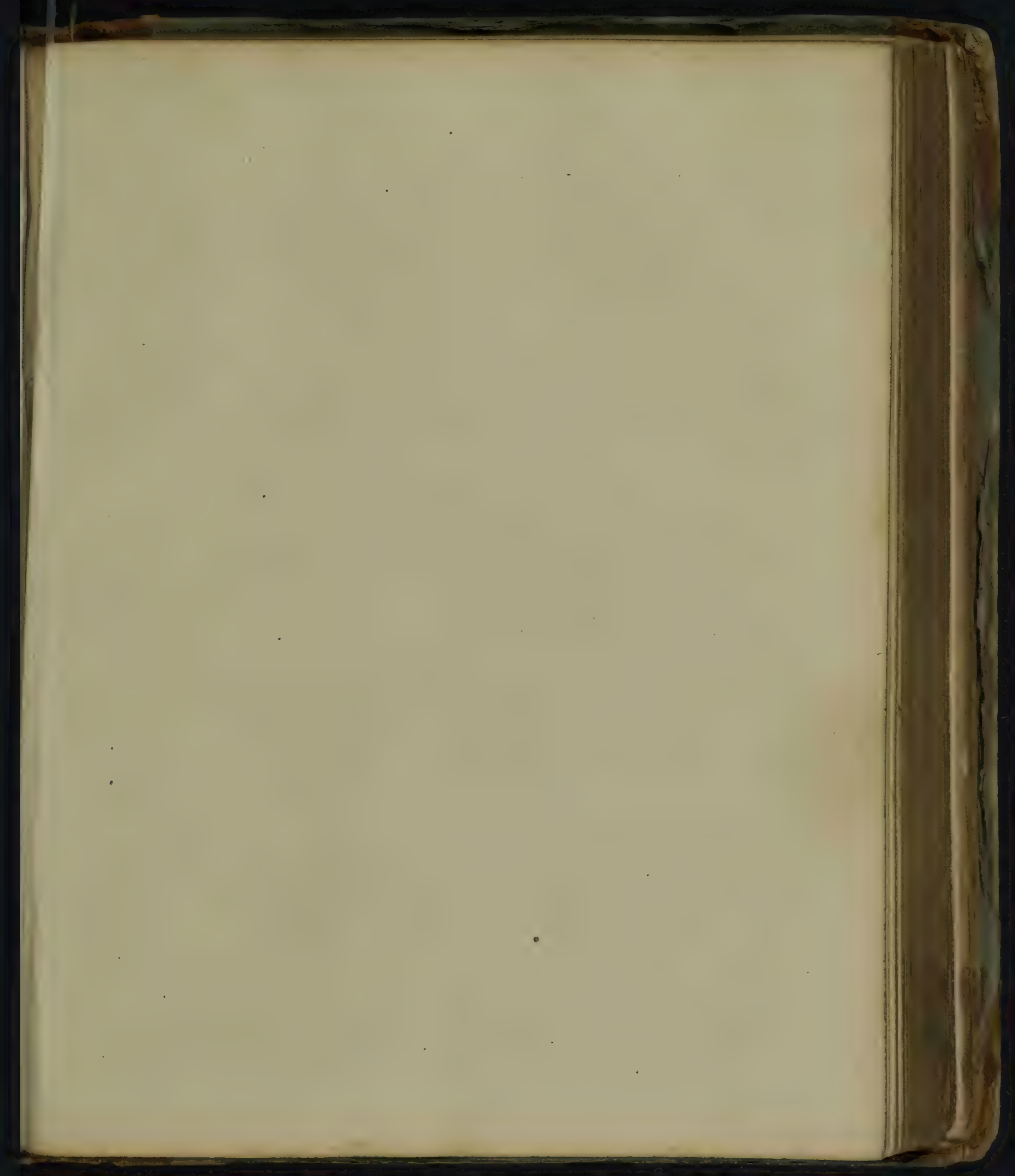






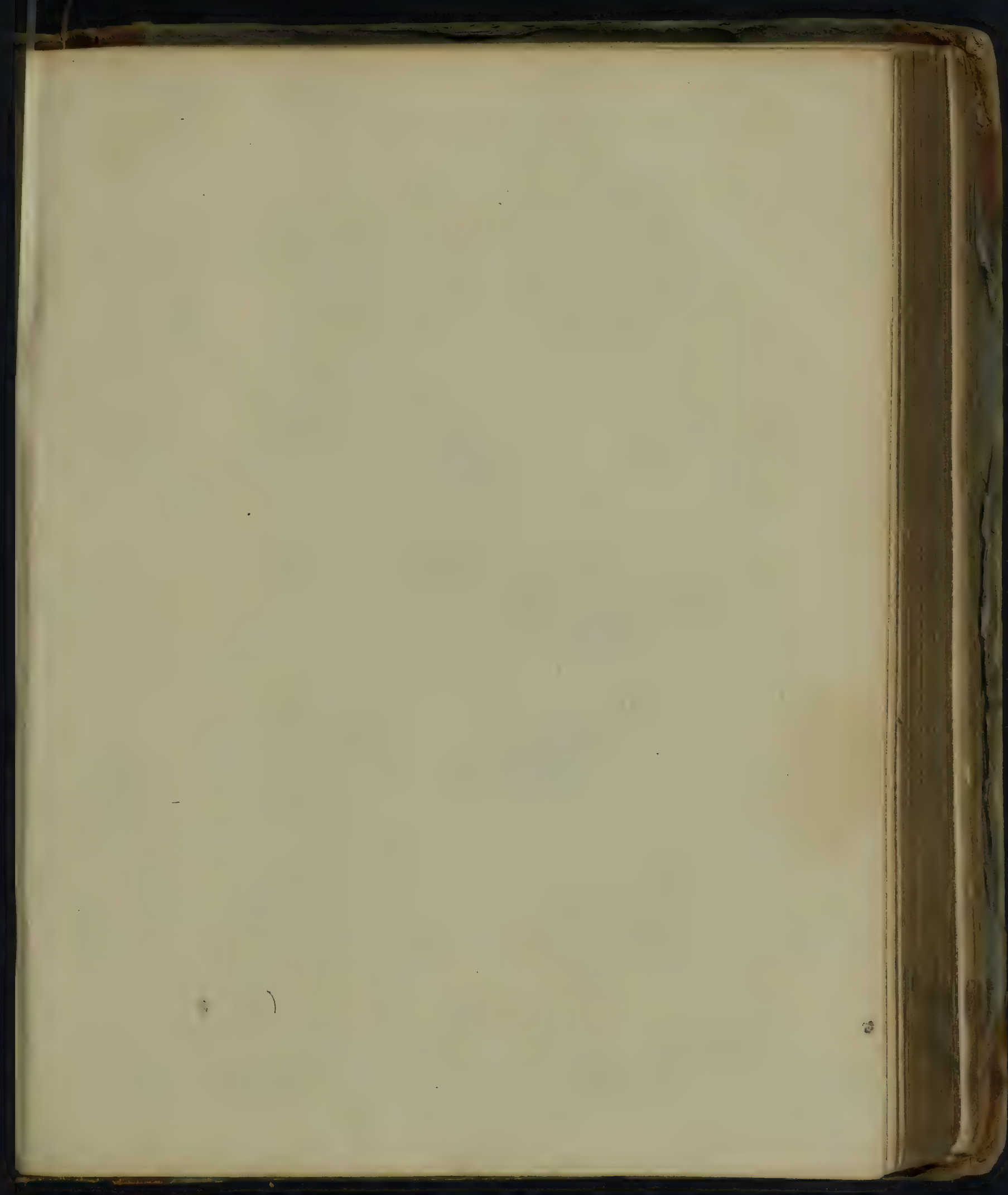






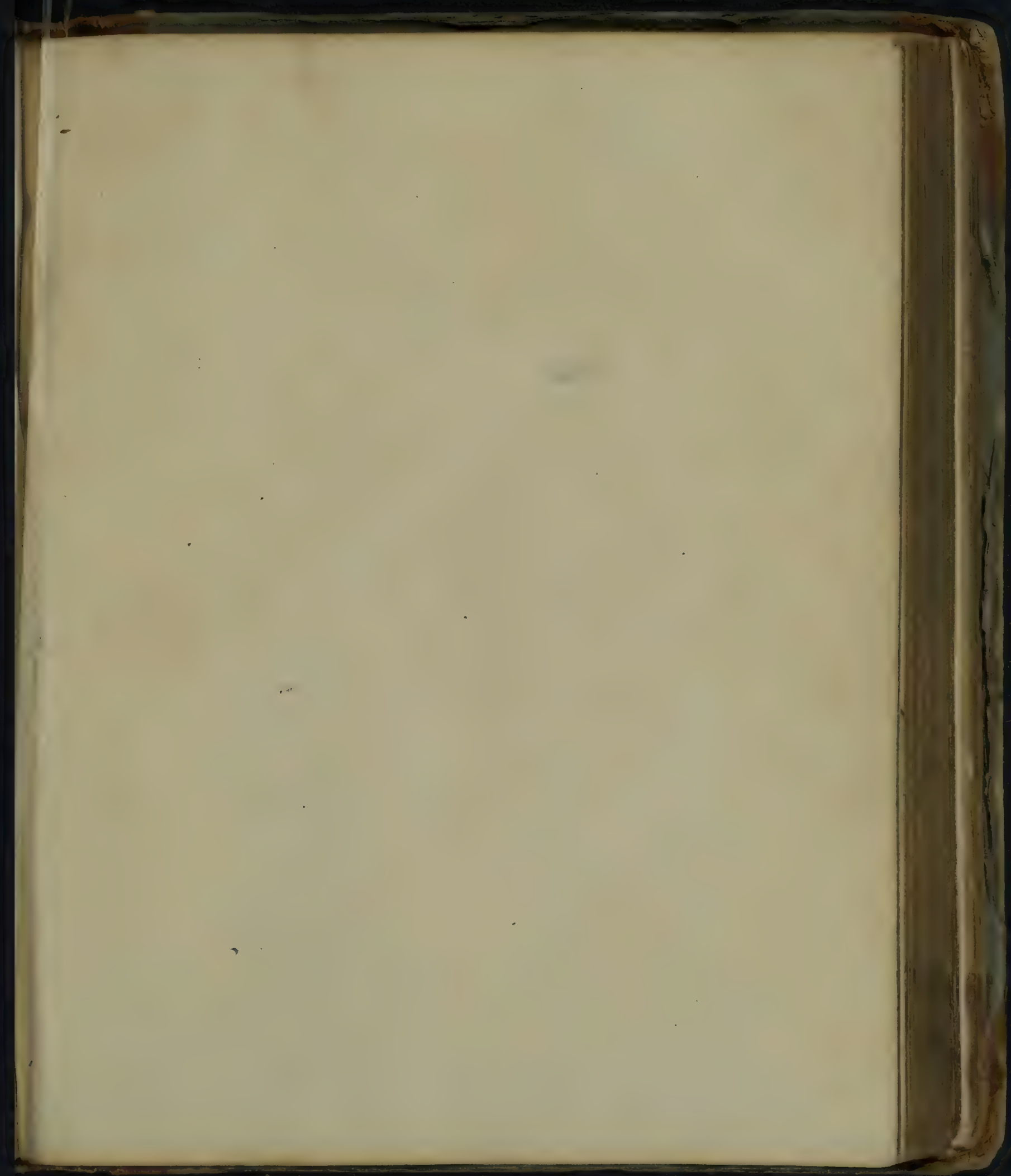






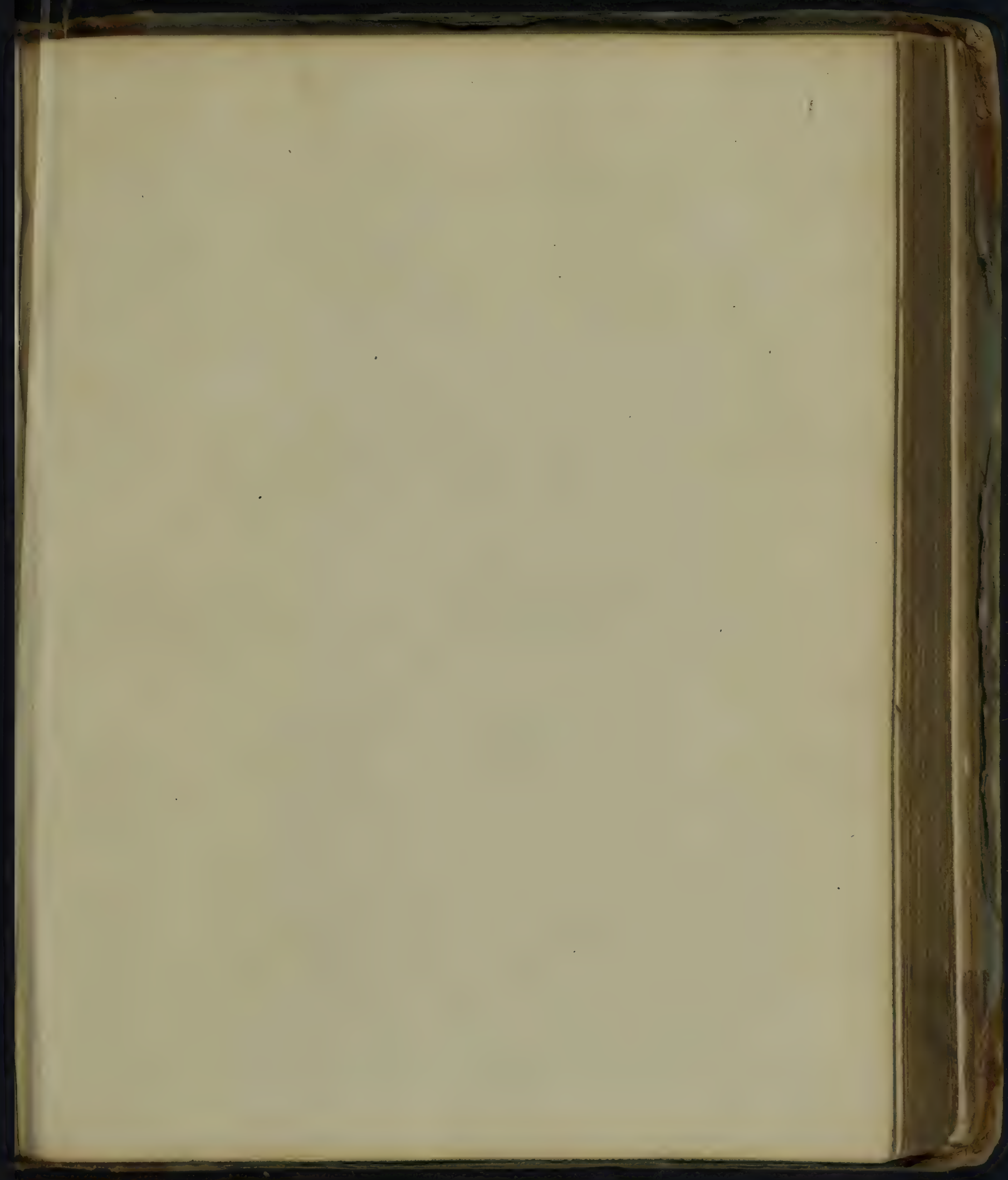






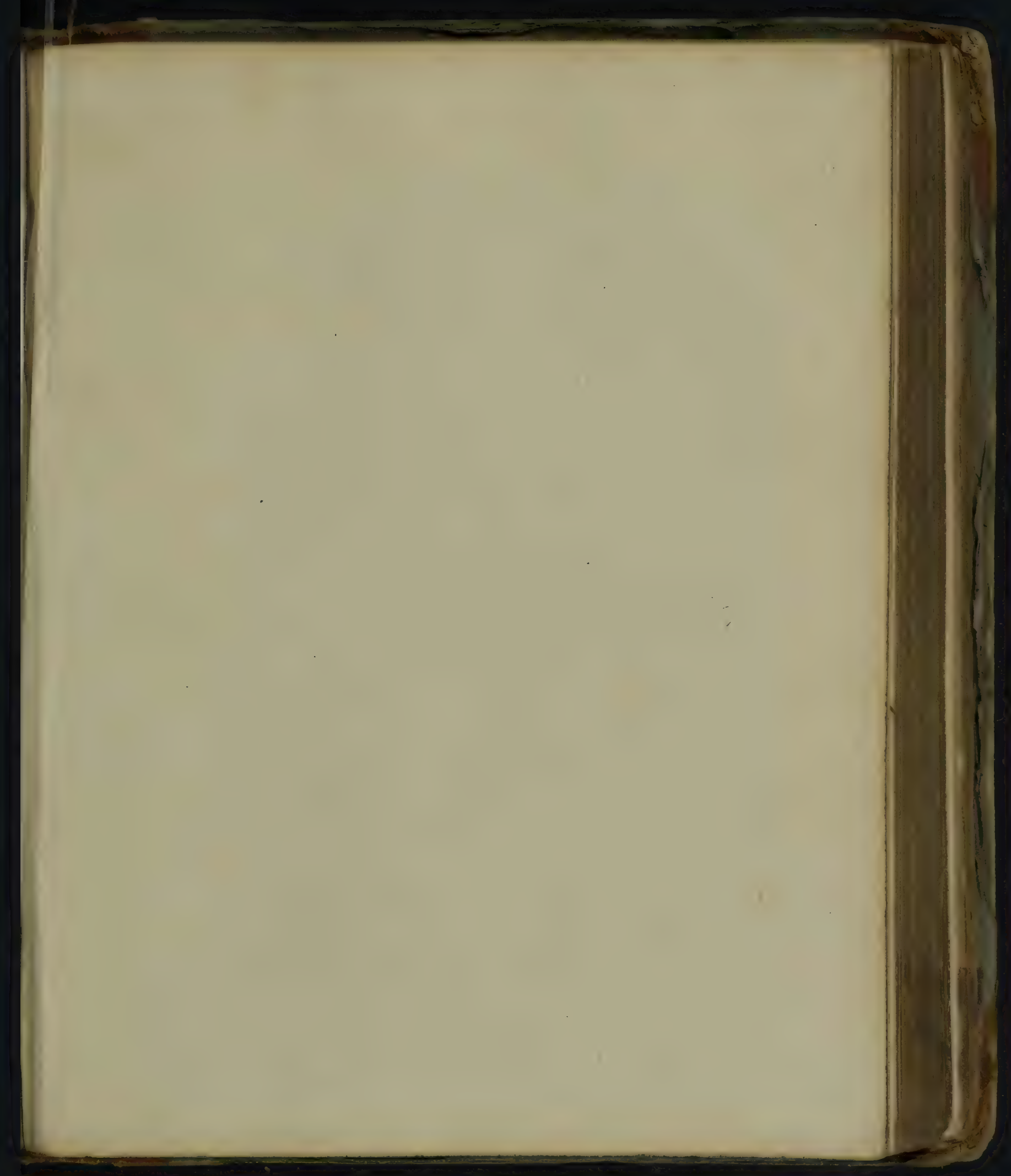






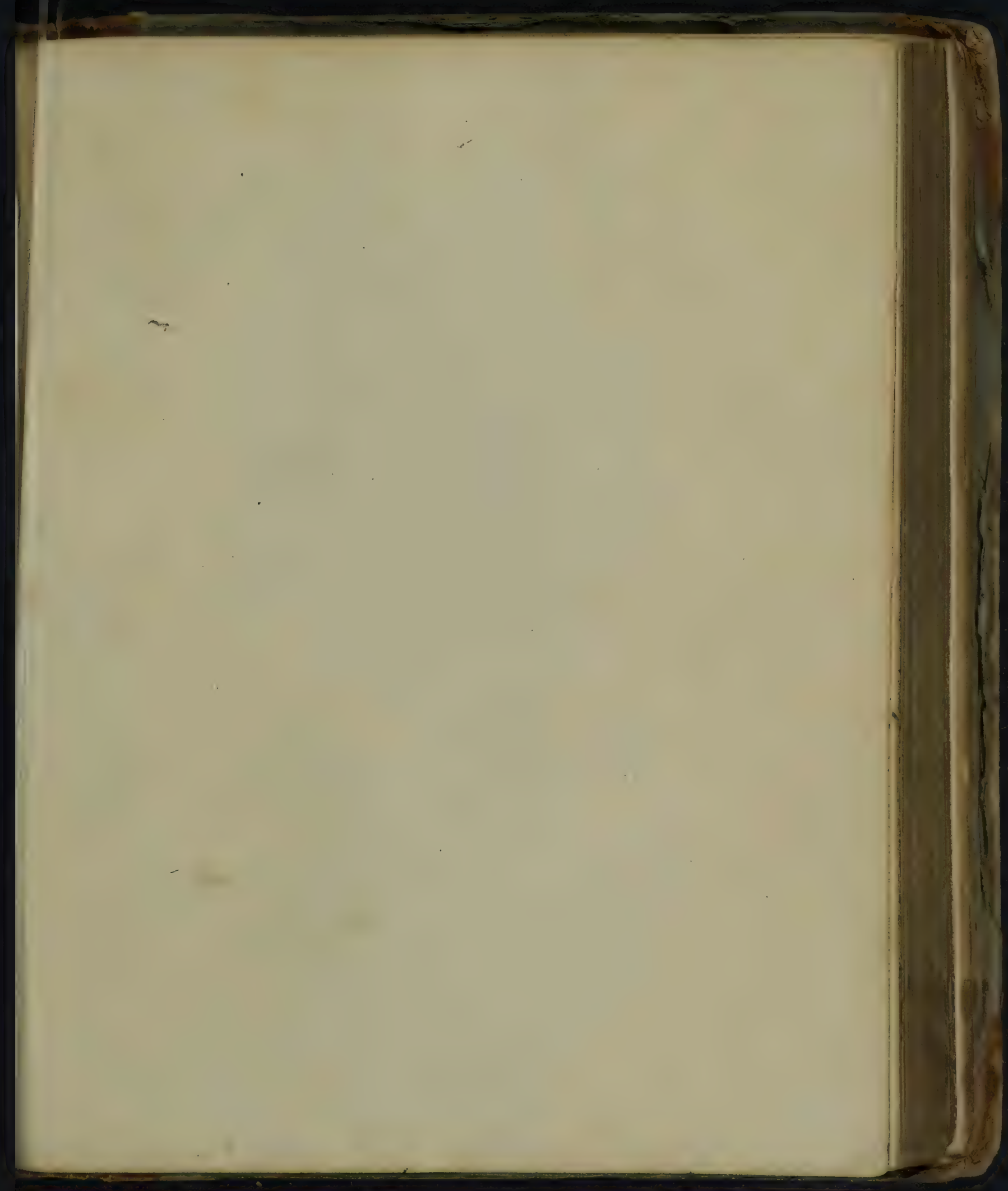






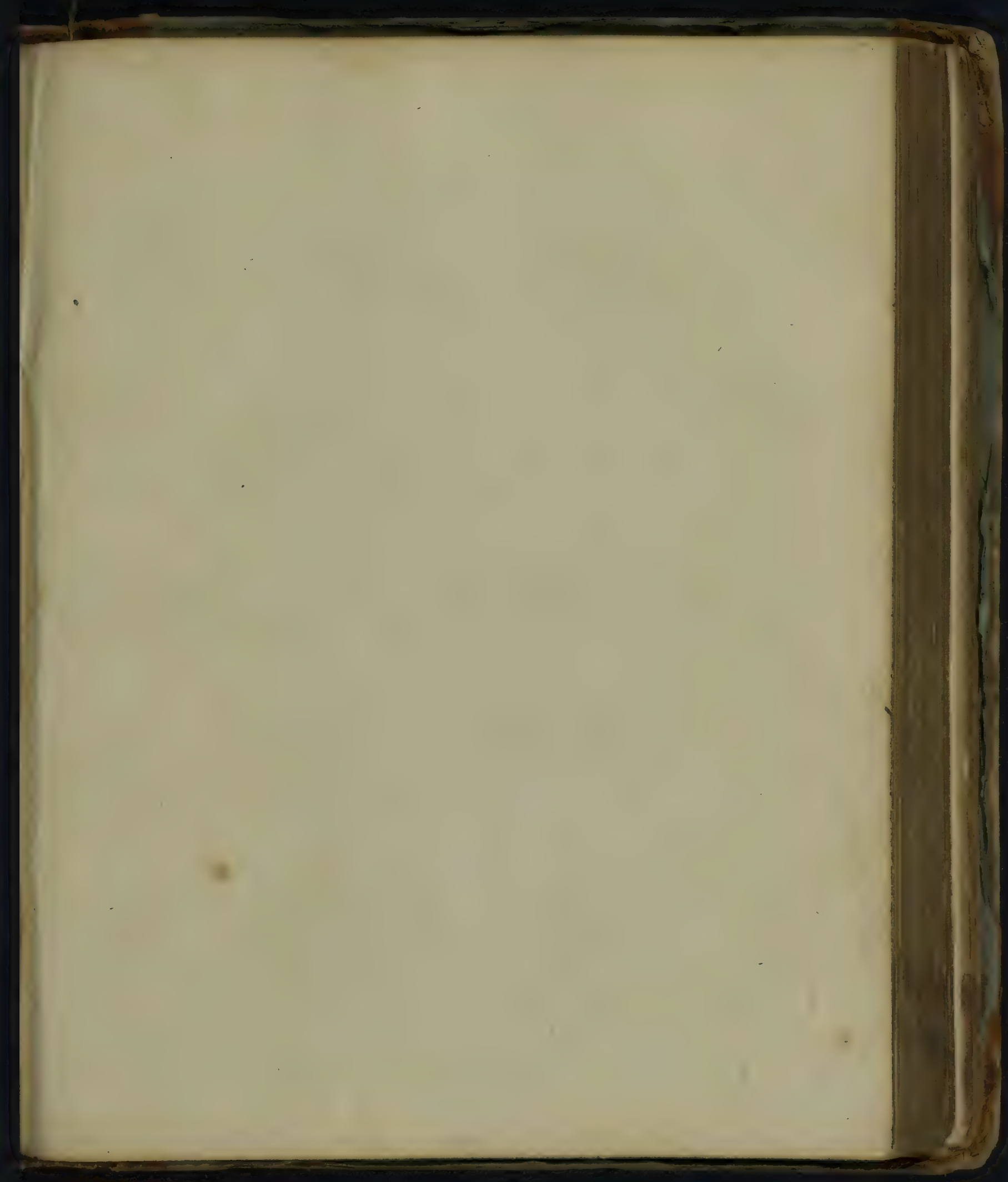


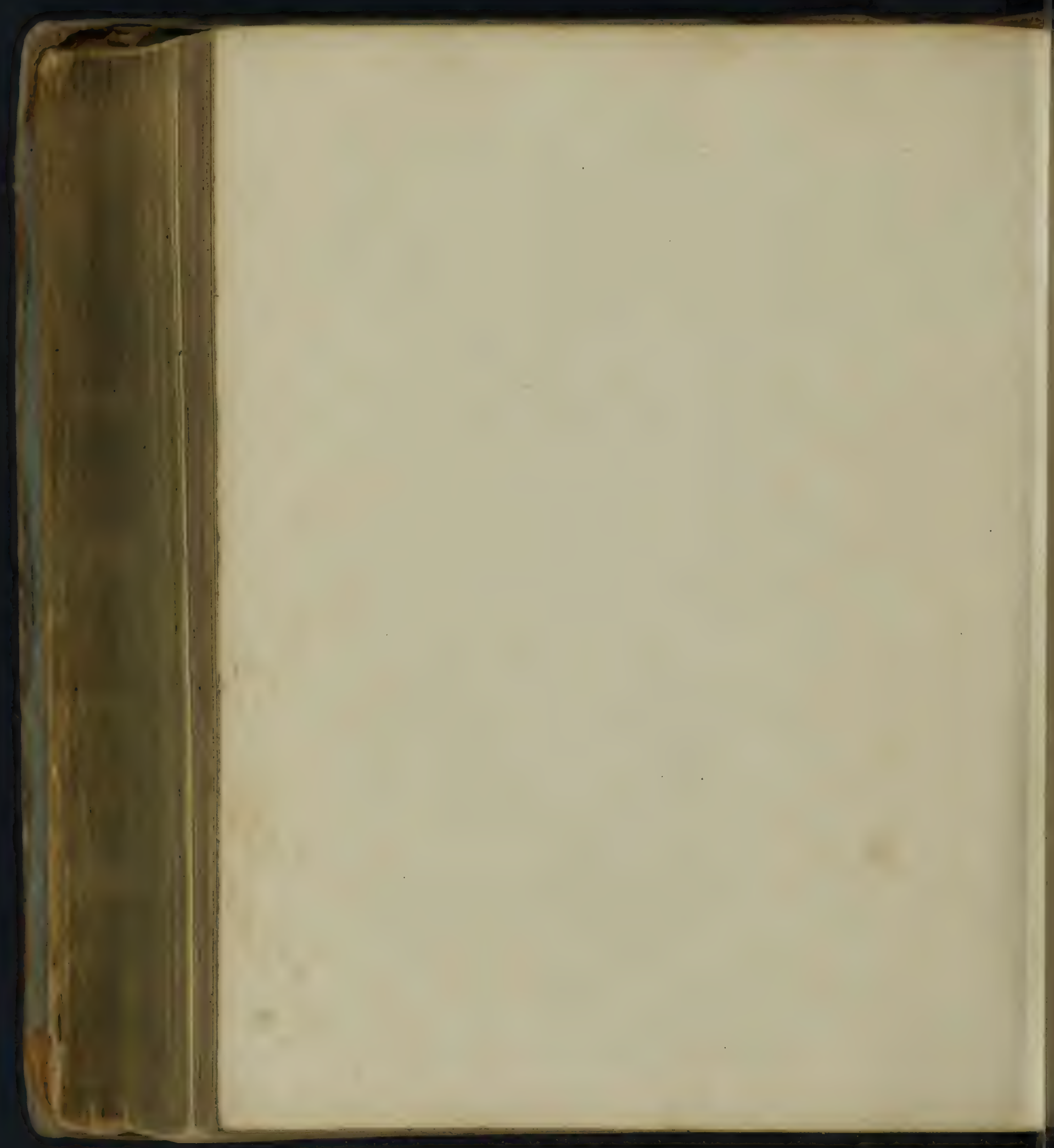




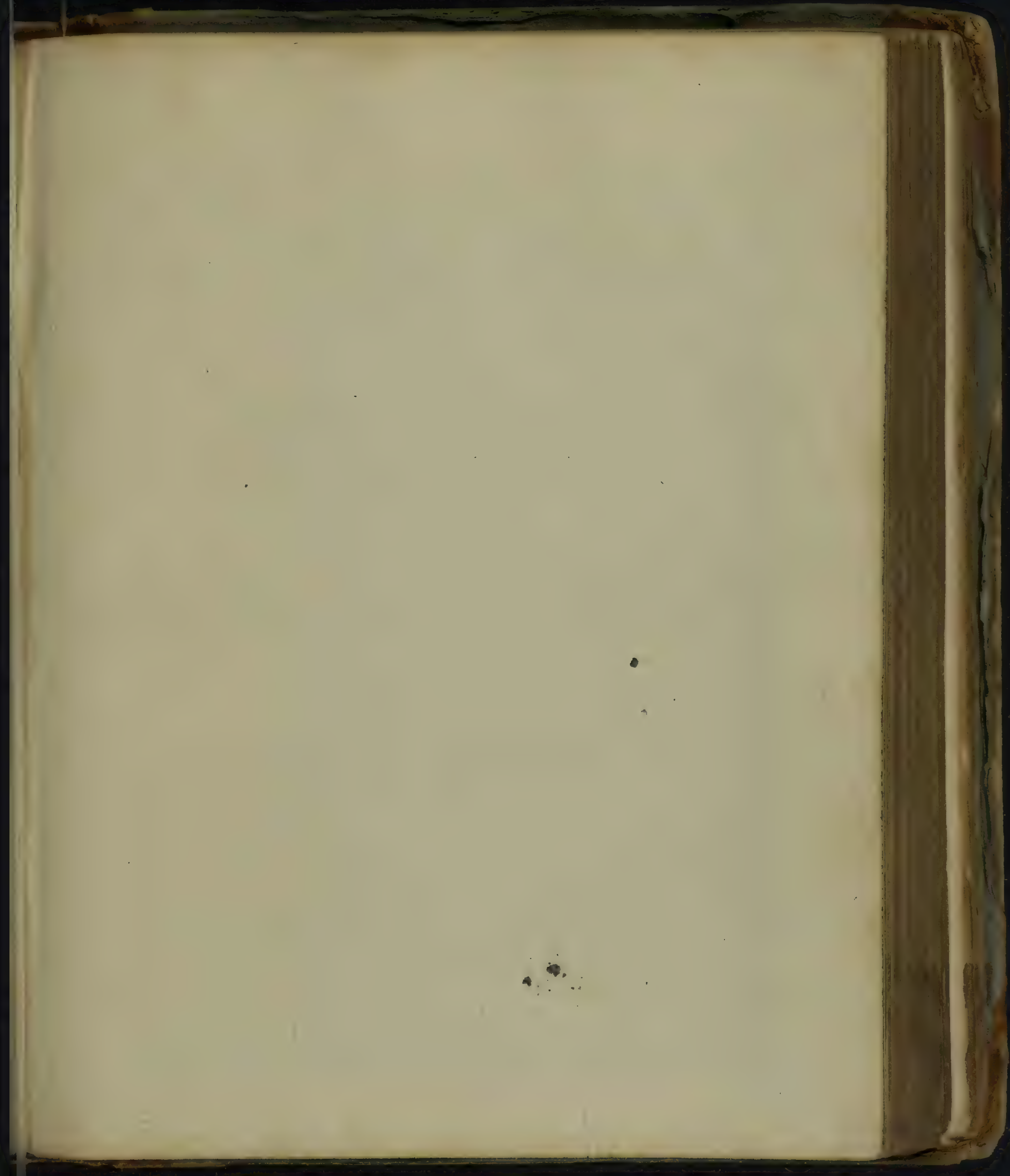






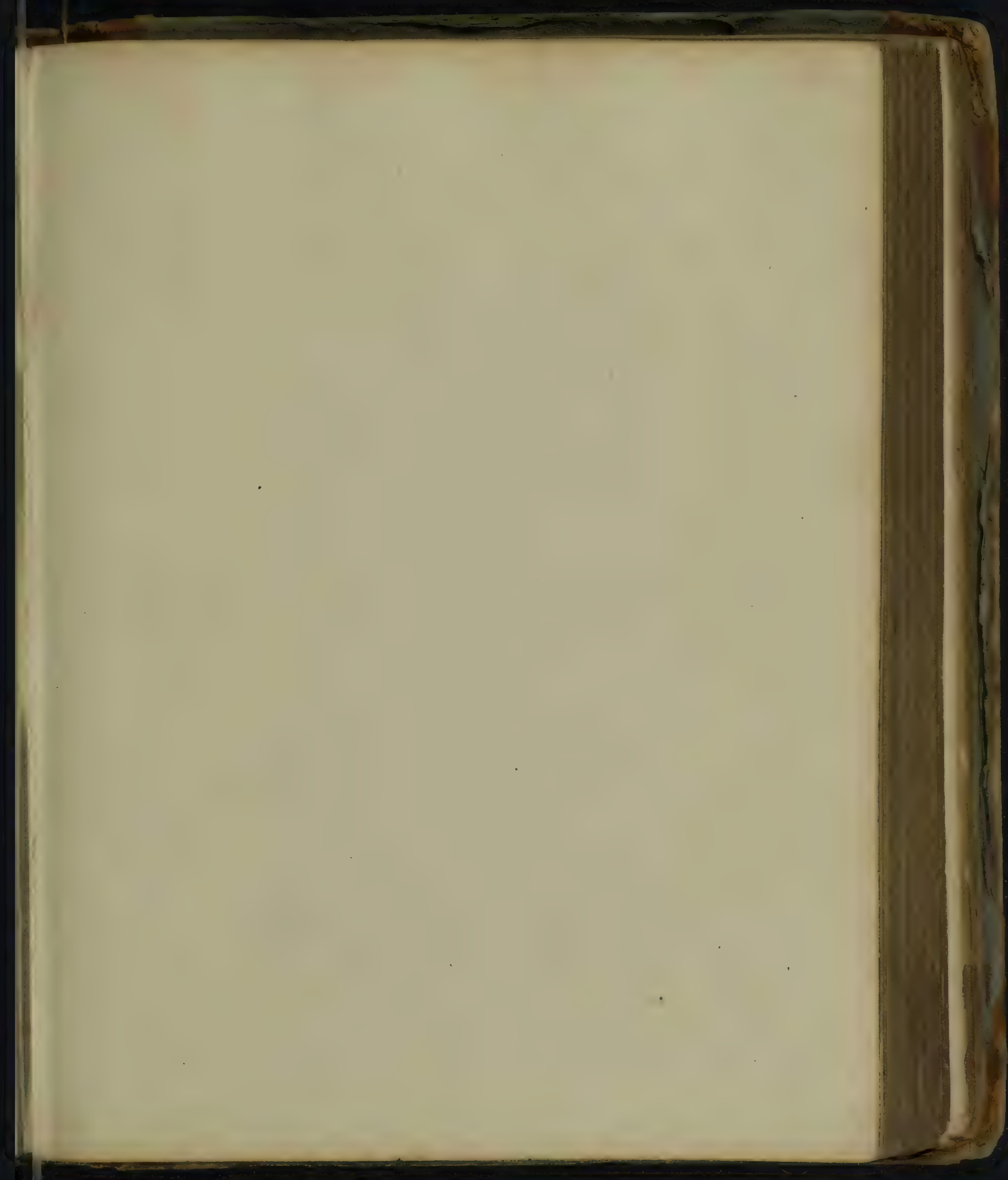






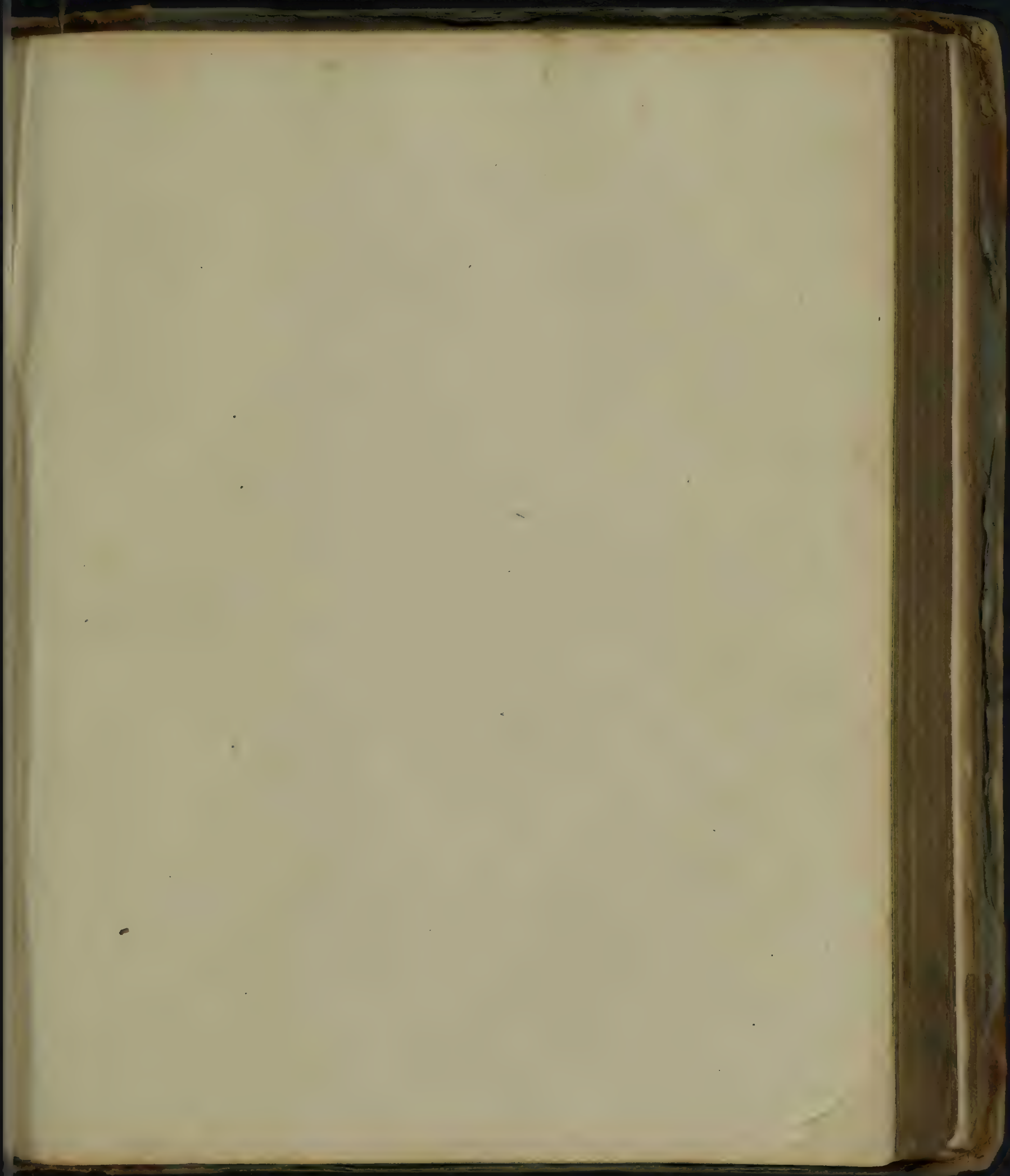






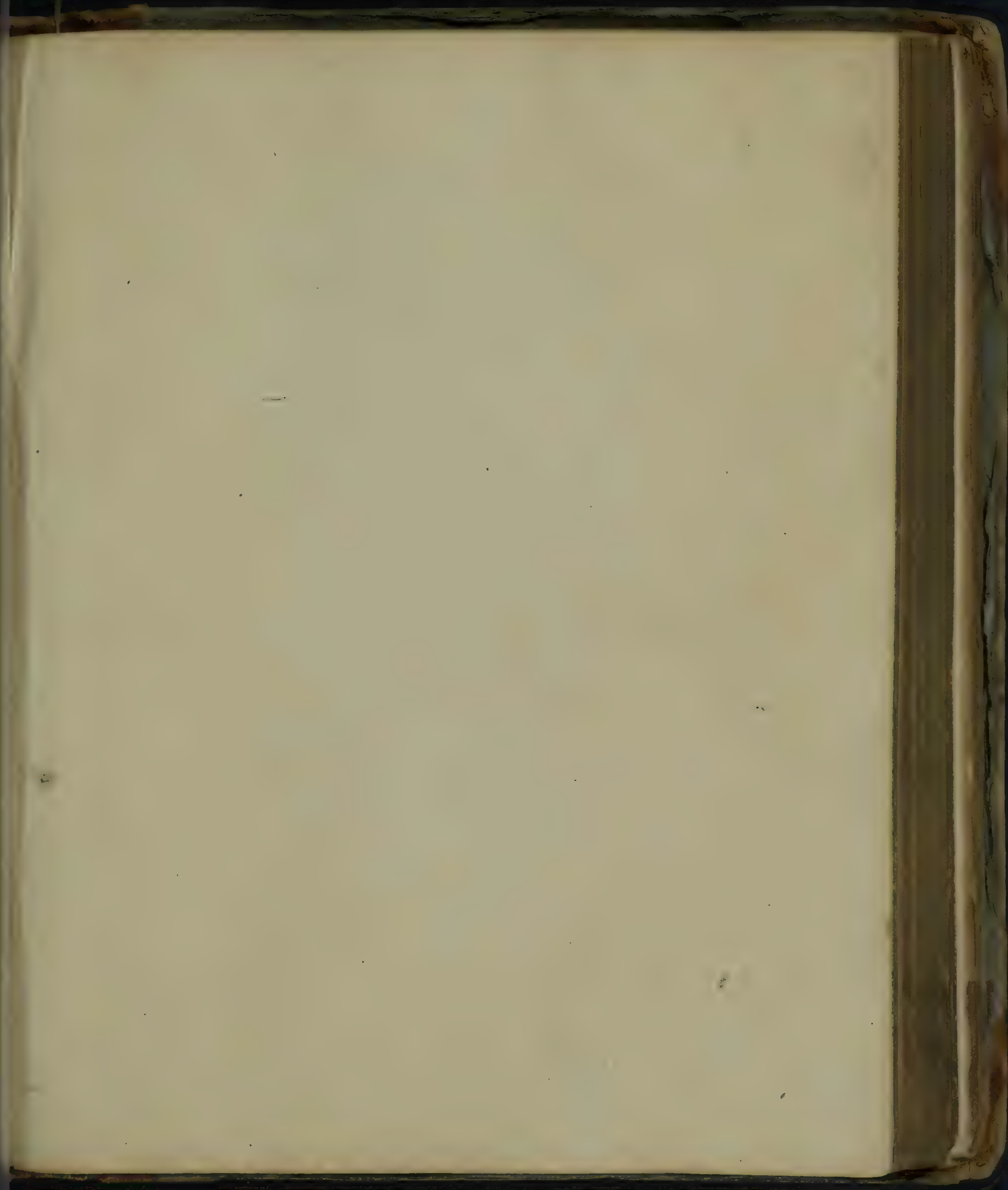


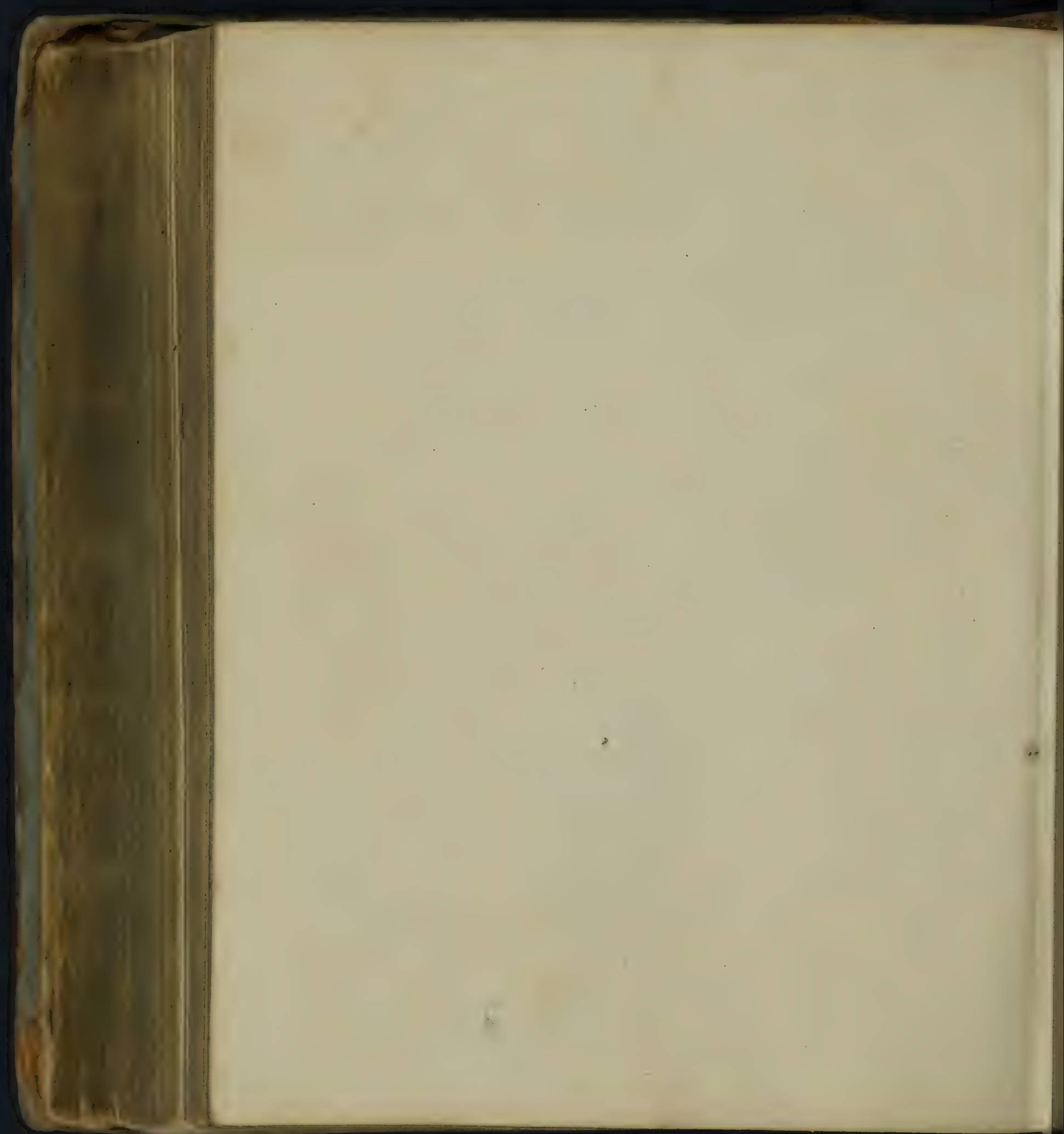




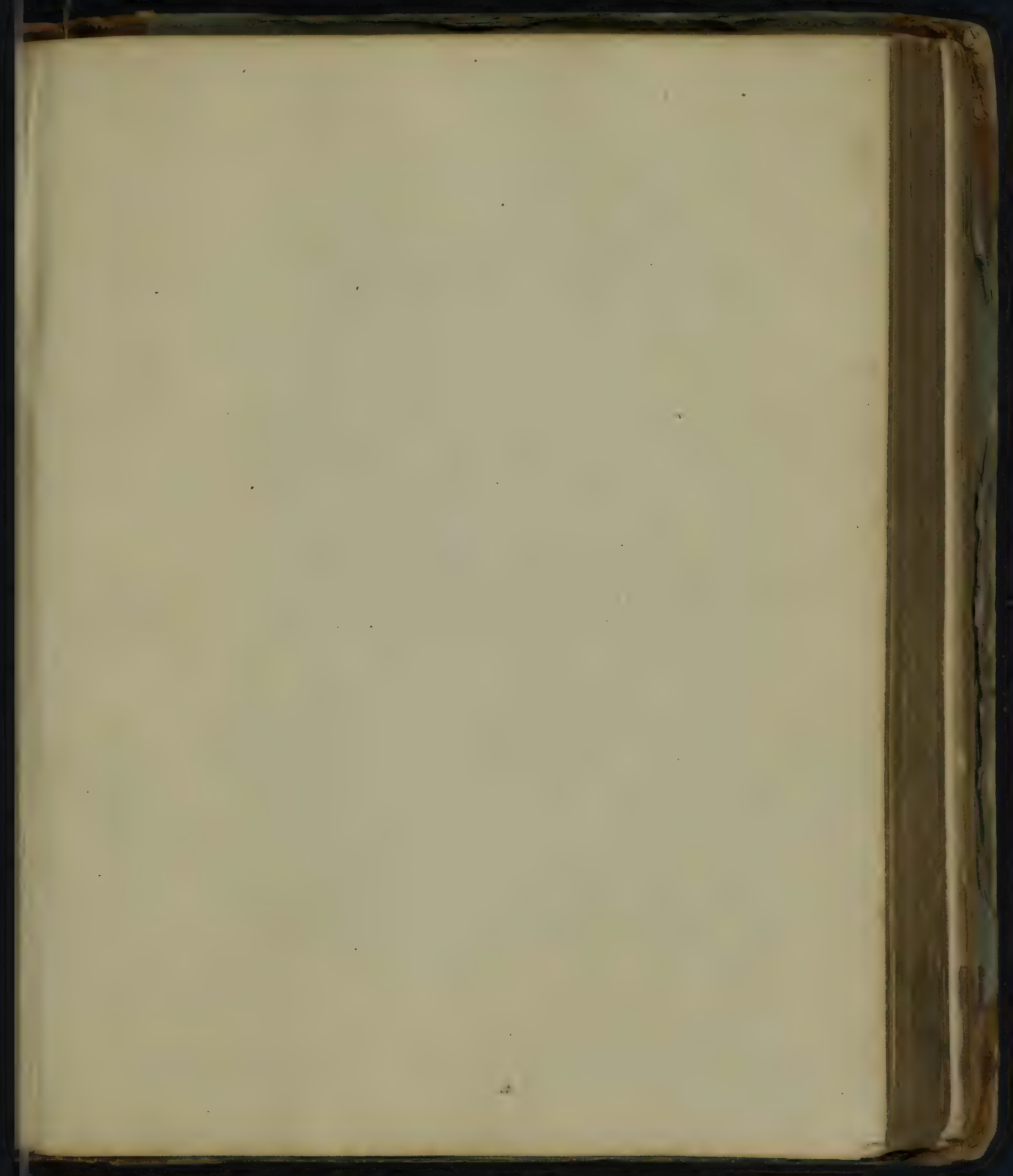


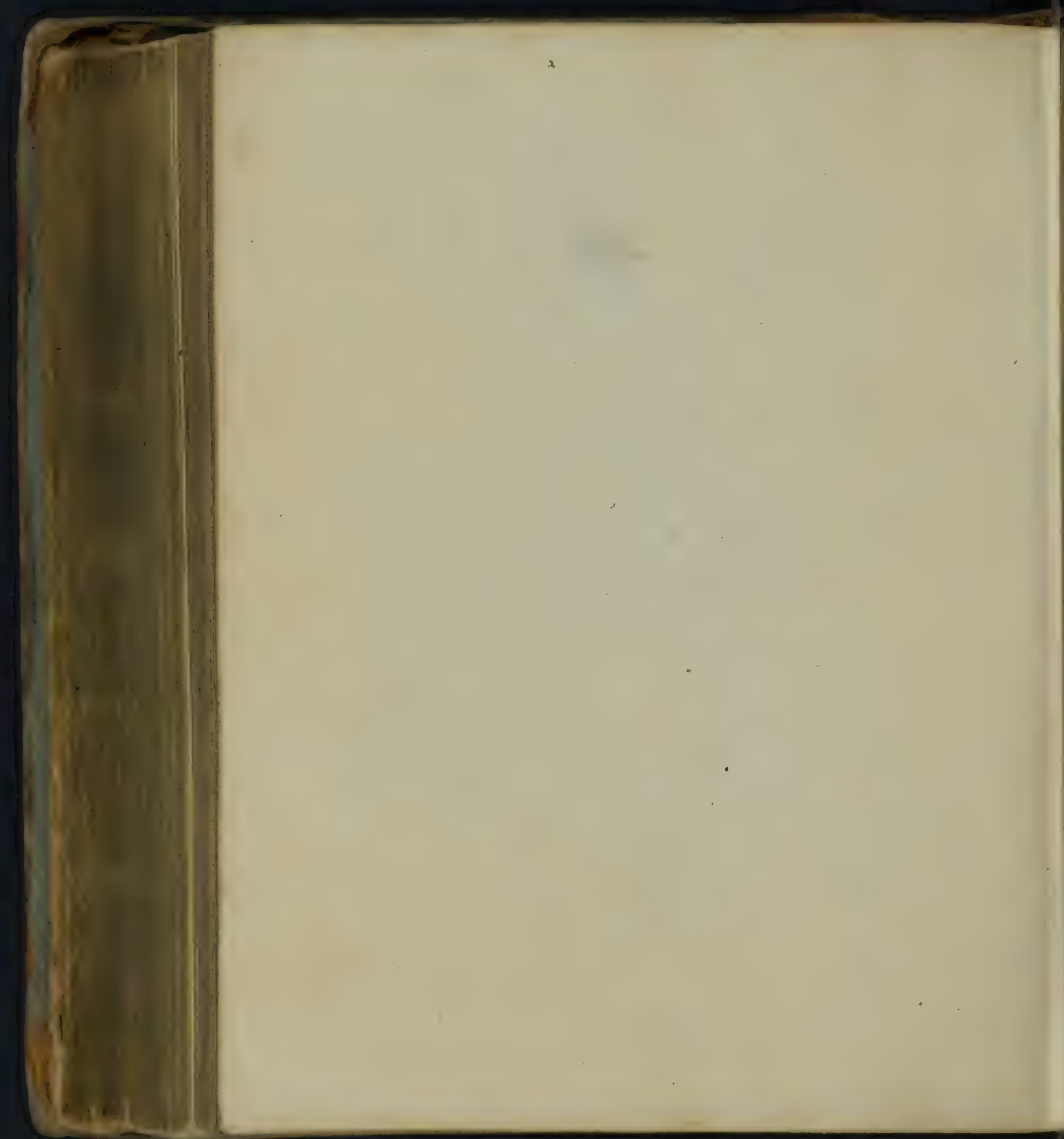




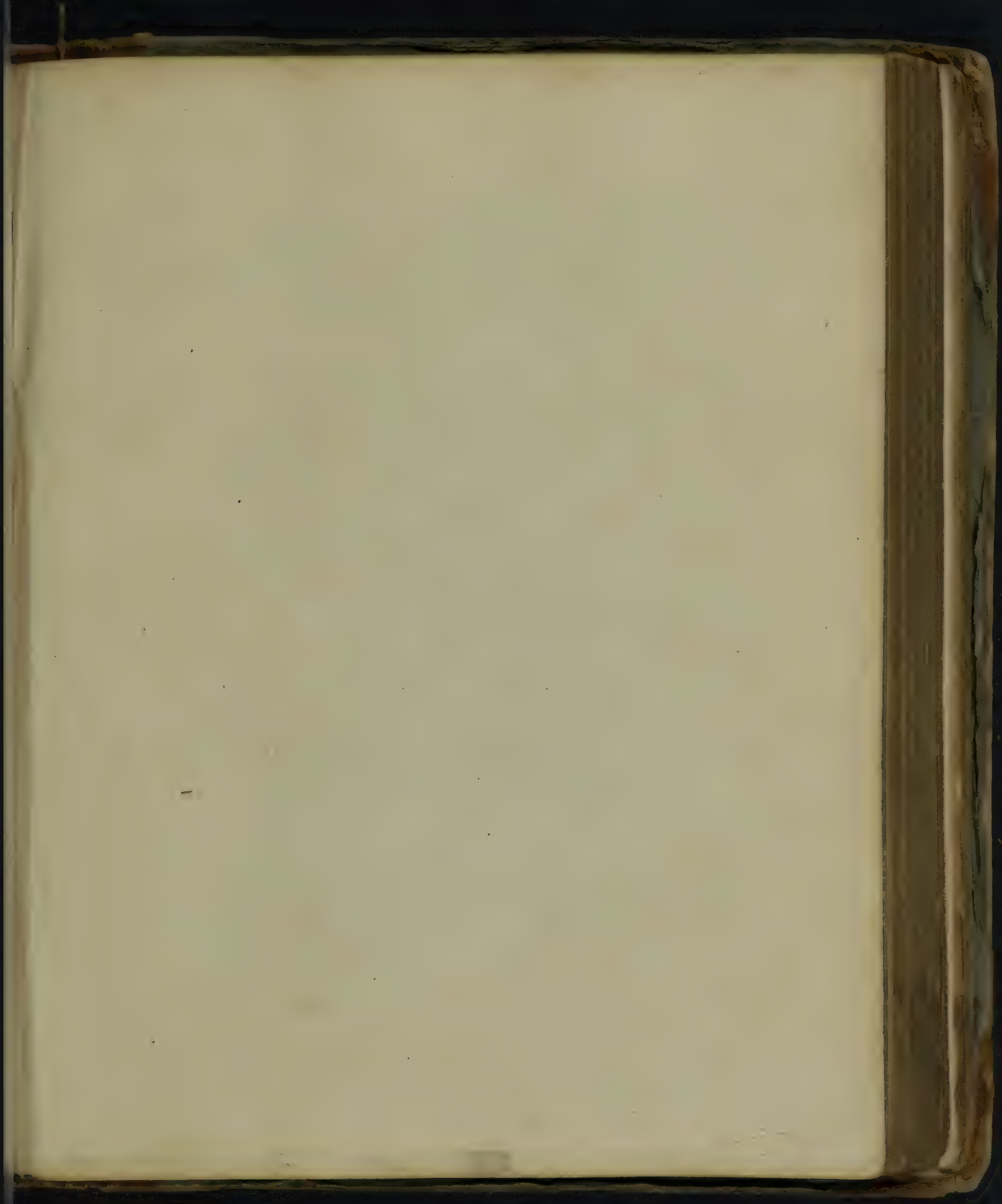


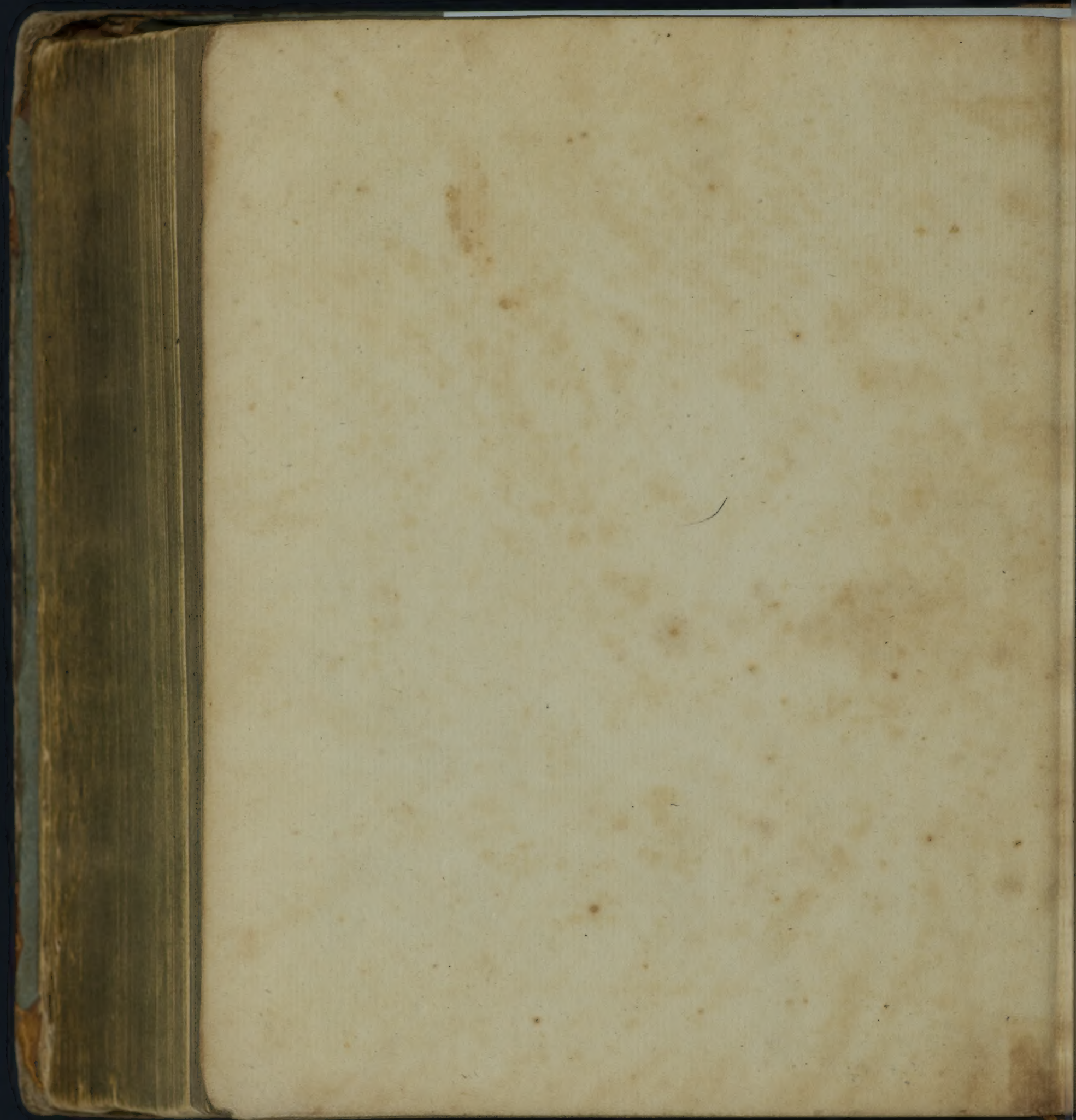














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